DOCKET

No. 07-330
Title: Michael Greenlaw, aka Mikey, Petitioner
v.
United States
Docketed: September 12, 2007
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (06-1365)
Decision Date: March 23, 2007
Rehearing Denied: May 10, 2007
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jul 26 2007	Application (07A80) to extend the time to file a petition for a writ of certiorari from August 8, 2007 to September 7, 2007, submitted to Justice Alito.
Jul 27 2007	Application (07A80) granted by Justice Alito extending the time to file until September 7, 2007.
Sep 7 2007	Petition for a writ of certiorari filed. (Response due October 12, 2007)
Oct 5 2007	Order extending time to file response to petition to and including November 13, 2007.
Nov 13 2007	Brief of respondent United States filed.
Nov 28 2007	DISTRIBUTED for Conference of January 4, 2008.
Nov 29 2007	Reply of petitioner Michael Greenlaw, aka Mikey filed.
Jan 4 2008	Petition GRANTED. The brief of petitioner is to be filed on or before Thursday, February 14, 2008. The brief of respondent is to be filed on or before Wednesday, March 12, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Jan 10 2008	Jay T. Jorgensen, Esquire, of Washington, D.C., is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
Jan 30 2008	SET FOR ARGUMENT ON Tuesday, April 15, 2008.
Feb 12 2008	Record received from U.S.C.A. for thr 8th Circuit. (1 envelope) A portion of this record is under seal.
Feb 14 2008	Joint appendix filed. (Statement of costs received)
Feb 14 2008	Brief of petitioner Michael Greenlaw, aka Mikey filed.
Feb 14 2008	Brief of respondent United States filed.
Feb 21 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Mar 5 2008	Motion for divided argument filed by respondent United States.
Mar 5 2008	CIRCULATED.
Mar 11 2008	The time within which to file the Court appointed brief of amicus curiae in support of the judgment below is extended to and including March 14, 2008.
Mar 14 2008	Brief of Court-Appointed Amicus Curiae In Support of the Judgment Below filed. (Distributed)
Mar 17 2008	Motion for divided argument filed by respondent GRANTED.
Mar 27 2008	Record received from the U.S.D.C. District of Minnesota. (2 boxes)
Apr 8 2008	Reply of petitioner Michael Greenlaw, aka Mikey filed. (Distributed)
Apr 8 2008	Reply of respondent United States filed. (Distributed)
Apr 8 2008	Letter from counsel for petitioner received. (Distributed).

Docket No. 07-590

Apr 15 2008 Argued. For petitioner: Amy Howe, Washington, D.C. For United States: Deanne E. Maynard, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For amicus curiae in support of the judgment below: Jay T. Jorgensen, Washington, D.C. (Appointed by this Court.)

PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

Michael J. Greenlaw,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1937, this Court described as "inveterate and certain," the principle that an appellee "may not, in the absence of a cross-appeal ... 'attack the decree with a view either to enlarging his own rights thereunder or lessening the rights of his adversary.'" *Morely Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191 (1937) (citation omitted). In light of this principle, numerous courts have held that a court of appeals may not order an increase in a criminal defendant's sentence in the absence of an appeal or cross-appeal by the Government. The Eighth and Tenth Circuits, however, have held that courts of appeals may *sua sponte* order increases in a defendant's sentence when the district court has failed to impose a statutory mandatory minimum sentence, even if the Government has not appealed or cross-appealed the sentence. The question presented is:

Whether a federal court of appeals may increase a criminal defendant's sentence *sua sponte* and in the absence of a cross-appeal by the Government.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael J. Greenlaw respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a) is published at 481 F.3d 601.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2007. Pet. App. 1a. On April 24, 2007, the Eighth Circuit granted petitioner leave to file an out-of-time petition for rehearing and rehearing en banc, Pet. App. 27a, which was denied on May 10, 2007, *id.* 28a. On July 27, 2007, Justice Alito extended the time for filing this petition through September 7, 2007. *See* 07A80. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

Section 3742(b) of Title 18 provides in relevant part:

> **Appeal by the Government.** – The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –
>
> (1) was imposed in violation of law. . . .
>
> The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

STATEMENT

After being convicted on drug and firearm charges, petitioner appealed his 442 month sentence to the Eighth Circuit. The Government did not appeal or cross-appeal the sentence. Nor, in responding to petitioner's appeal, did the Government request that the court of appeals review any of the district court's sentencing rulings favorable to petitioner. Nonetheless, the court of appeals *sua sponte* concluded that the district court had failed to impose a mandatory minimum sentence required by 18 U.S.C. § 924(c)(1)(C) and remanded the case with orders that petitioner's sentence be increased by fifteen years. In so doing, the court acknowledged it was further exacerbating a circuit split over whether a court of appeals may increase the sentence of a criminal defendant in the absence of an appeal or cross-appeal by the Government.

1. Petitioner, along with seven others, was arrested and accused of being a member of a street gang that sold crack cocaine on the south side of Minneapolis. Pet. App. 2a-4a. Six of those arrested pled guilty, while petitioner and another co-defendant stood trial on various drug and gun-related charges. After a two-week jury trial, petitioner was convicted of conspiracy to distribute in excess of fifty grams of crack cocaine (Count 1), conspiracy to possess firearms in relation to a drug trafficking crime (Count 2), carrying a firearm in relation to a drug trafficking crime (Counts 4), conspiracy to assault with a dangerous weapon (Count 5), two counts of assault with a dangerous weapon (Counts 6 and 8), and carrying a firearm during a crime of violence (Count 10). Pet. App. 4a, 7a-8a.[1]

The court sentenced petitioner to a total of 262 months for the various drug and conspiracy counts. Pet. App. 7a-8a. The court then turned to the gun counts. The Government argued that under 18 U.S.C. § 924(c), petitioner should be

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[1] Petitioner was acquitted an additional charge of carrying a firearm during a drug trafficking crime. Pet. App. 4a.

sentenced to a mandatory minimum sentence of five years for the first gun offense (Count 4), and an additional consecutive term of 25 years for the second gun count (Count 10) because the second count constituted a "second or subsequent conviction" within the meaning of 18 U.S.C. § 924(c)(1)(C).[2] The trial court overruled the objection, concluding that Count 10 was not a second or subsequent conviction "because Greenlaw was only 'convicted' at the entry of judgment of conviction." Pet. App. 8a. Accordingly, the court sentenced petitioner to five years for the first weapons charge and ten years for the second, to be served consecutive to each other and to the 262 month sentence for the drug and conspiracy accounts. Thus, in all, the court sentenced petitioner to 442 months' imprisonment.

2. Although the district court rejected the Government's view of the mandatory minimum sentence required under Section 924(c), the Government did not appeal petitioner's sentence. Nor did it file a cross appeal when petitioner filed his own notice of appeal objecting to his sentence and conviction. *See* Pet. App. 9a.[3] Moreover, in responding to petitioner's challenge to his sentence in the Eighth Circuit, the Government did not urge the court of appeals to review the application of Section 924(c). *See id.* Instead, the Government simply noted, in passing, that "[a]lthough 19

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[2] That provision mandates that "[i]n the case of a second or subsequent conviction under this subsection, the person shall ... be sentenced to a term of imprisonment of not less than 25 years." Section 924(c)(1)(D)(ii) further provides that "no term of imprisonment on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person."

[3] Petitioner appealed (1) the denial of his motion to sever his trial from his co-defendant's; (2) the denial of his request to represent himself; (3) the denial of his request for a downward departure; (4) the calculation of his criminal history category; and (5) the reasonableness of his sentence. Pet. App. 2a, 6a-7a.

U.S.C. § 924(c) required a 5-year sentence on Count 4 (consecutive to the 262 month guideline sentence, and a 25-year sentence, consecutive to the previously imposed sentences), the court gave the defendant 5 years consecutive for Court 4 and 10 years consecutive for Court 10, resulting in a total sentence of 442 months rather than 662 months." Govt. CA Br. 35. The conclusion the Government drew from this observation was not that petitioner's sentence should be increased, but rather that the "district court's sentence was not unreasonable." *Id.* 36.

The court of appeals agreed with the Government that petitioner's sentence was not unreasonable and, accordingly rejected that, and every other, objection petitioner raised against his conviction and sentence through his properly-noticed appeal. But rather than affirming the district court's decision, the Eighth Circuit *sua sponte* vacated petitioner's sentence and remanded with instructions to increase petitioner's sentence by fifteen years because it concluded that the district court had erred in declining to apply the 25 year mandatory minimum sentence for "second and subsequent" gun convictions under Section 924(c)(1)(C). Pet. App. 8a-9a. The court acknowledged that the "government ... did not appeal the issue." *Id.* 9a. Nonetheless, it concluded that

> [b]ecause this error seriously affects substantial rights and the fairness, integrity, and public reputation of judicial proceedings, and because we think it is judicially efficient for us to address the error, we exercise our discretion under Fed. R. Crim. P. 52(b) and find the district court plainly erred in excluding the statutory mandatory sentence under Count 10.

Id. 9a-10 (footnote omitted).

In reaching this conclusion, the court noted that its decision was consistent with the Tenth Circuit's decision in *United States v. Moyer*, 282 F.3d 1311, 1313, 1317-19 (10th

Cir. 2002), but in conflict with the Seventh Circuit's decision in *United States v. Rivera*, 411 F.3d 864, 867 (7th Cir. 2005). *See* Pet. App. 9a-10a n.5, which held that a criminal defendant's sentence may not be increased unless the Government files an appeal or cross appeal.

On April 24, 2007, the Eighth Circuit granted petitioner leave to file an out-of-time petition for rehearing and rehearing en banc, Pet. App. 27a, which was denied on May 10, 2007, *id.* 28a. This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents the Court an opportunity to resolve a growing division among the circuits over whether a court of appeals may enlarge a criminal defendant's sentence in the absence of an appeal or cross-appeal by the Government. The majority of courts to have confronted the question have faithfully applied this Court's long-established rule that "[a]bsent a cross-appeal, an appellee . . . may not attack the decree with a view either to enlarging his own rights thereunder or lessening the rights of his adversary." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999) (internal quotation marks omitted). The Eighth and Tenth Circuits, however, have held that a court of appeals may *sua sponte* order an increase in a defendant's sentence to correct a district court's erroneous application of a statute requiring a mandatory minimum sentence.

This division of authority reflects a broader conflict over whether the cross-appeal requirement imposes a restriction on appellate jurisdiction – allowing for no exceptions, even to correct a plain error – or a rule of practice subject to exception in appropriate cases. This Court recognized, but did not resolve, that conflict in *Neztsosie* and granted certiorari to decide the question three years later in *Zapata Industries v. W.R. Grace & Company*, 536 U.S. 990 (2002), but was prevented from doing so when the case was settled and the petition withdrawn, 537 U.S. 1025. This case

provides the Court a vehicle for completing that unfinished business.

I. The Circuits Are Intractably Divided Over Whether A Court Of Appeals May Increase A Criminal Defendant's Sentence Absent An Appeal Or Cross-Appeal By The Government.

Seventy years ago, this Court reaffirmed the "inveterate and certain" principle that an appellee "may not . . . in the absence of a cross-appeal ... 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *Morely Cons... Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191 (1937) (citation omitted). Indeed, the Court had "recognized [this] limitation as early as 1796." *Neztsosie*, 526 U.S. at 479 (citing *McDonough v. Dannery*, 1 L.Ed. 563). In "more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of [this Court's] holdings has ever recognized an exception to the rule." *Id.* at 480. The Eighth Circuit's disregard for the "inveterate" cross-appeal requirement in this case further deepened a growing division among the courts of appeals over the specific question whether a cross-appeal is required to enlarge a criminal sentence, as well as the more general question whether the cross-appeal requirement is a jurisdictional limitation or a rule of practice.

A. The Eighth And Tenth Circuits Have Departed From The Majority Rule Prohibiting Enlargement Of A Criminal Sentence Absent An Appeal Or Cross-Appeal By The Government.

While most courts have adhered to the cross-appeal requirement in criminal sentencing appeals, the Eighth and Tenth Circuits have held that the absence of a cross-appeal does not prevent a court of appeals from correcting a plain sentencing error resulting in an unlawfully low sentence.

1. In this case, the Eighth Circuit was aware that the Government had not cross-appealed petitioner's sentence, Pet.

9a, and that the Seventh Circuit had held that the absence of a Government cross-appeal prevents enlargement of a criminal sentence under this Court's decision in *Neztsosie*, *id.* at 9a-10a n.5. Nonetheless the Eighth Circuit held that it had "discretion under Fed.R.Crim.P. 52(b)" to correct a plain sentencing error that diminished a defendant's sentence if the error "seriously affects substantial rights and the fairness, integrity, and public reputation of judicial proceedings." Pet. App. 9a. It concluded that the district court's failure to impose a minimum sentence mandated by statute constituted such an error and, accordingly, *sua sponte* ordered a massive enlargement of petitioner's sentence. *Id.* 9a-10a.

The Tenth Circuit reached the same conclusion in *United States v. Moyer*, 282 F.3d 1311 (10th Cir. 2002). In that case, the defendant pleaded guilty pursuant to a plea agreement under which the Government agreed not to seek an enhancement under 18 U.S.C. § 924(e)(1).[4] The district court did not impose the enhancement, but the defendant appealed the sentence on other grounds. Although the Government did not cross-appeal, the Tenth Circuit nonetheless *sua sponte* vacated the sentence as unlawful and remanded for application of the Section 924(e)(1) enhancement, which it viewed as mandating an enhancement whether requested by the Government or not. 282 F.3d at 1317-19.[5] Like the Eighth Circuit in this case, the court found authority to enlarge the sentence in the absence of a cross-appeal in Fed. R. Crim. P. 52(b). *Id.* at 1318.

2. As the Eighth Circuit acknowledged, Pet. App. 9a-10a n.5., in *United States v. Rivera*, 411 F.3d 864 (7th Cir. 2005), the Seventh Circuit held that a court may *not* increase a

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[4] Section 924(e)(1) requires a mandatory minimum sentence of fifteen years for those convicted of a gun office after being convicted of three violent felonies or serious drug offenses.

[5] The court also provided, however, that the defendant be allowed to withdraw his guilty plea in light of the Government's promise not to seek the enhancement. *Id.* at 1319.

criminal defendant's sentence unless the Government appeals or cross-appeals the judgment. *See id.* at 867 ("By deciding not to take a cross-appeal, the United States ensured that Rivera's sentence cannot be increased.") (citing *Neztsosie*, 526 U.S. at 479-82). This rule has been recognized and applied in the Seventh Circuit on many occasions.[6]

Other circuits apply the same rule. For example, in *United States v. Harvey*, 2 F.3d 1318 (3d Cir. 1993), the defendant appealed his sentence, arguing that the district court erred in applying a certain upward departure under the Sentencing Guidelines. *Id.* at 1324. The Government acknowledged that the upward departure was erroneous, but argued that the district court had erred in the first instance in selecting the wrong base level offense. *Id.* at 1325. If the proper base level offense had been used, the defendant would have been given an even higher sentence than he received, even setting aside the upward departure. The court of appeals

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[6] *See, e.g., United States v. Goldman*, 219 Fed. Appx. 508, 510-11 (7th Cir. 2007) (unpublished) ("We see no authority here for the court to reduce the sentence below the mandatory minimum, but the government did not object in the district court and did not cross-appeal this issue. We therefore cannot disturb the sentence in a way that favors the government.") (citing, *inter alia*, *Neztsosie*, 526 U.S. at 479-82; *Rivera*, 411 F.3d at 867); *United States v. Miller*, 450 F.3d 270, 276 (7th Cir. 2006) ("Miller should give thanks that the United States did not file a cross appeal . . . . As it is, the prosecution was content with Miller's 300-month sentence, and the lack of a cross-appeal protects him against any increase."); *United States v. Malik*, 385 F.3d 758, 761 (7th Cir. 2004) ("[B]y not filing a cross-appeal, Malik disabled himself from receiving a sentence lower than 30 months [his original sentence]."); *Romandine v. United States*, 206 F.3d 731, 737 (7th Cir. 2000) ("The United States could have taken an appeal from the order [reducing the defendant's sentence], and had this been done, we would have reversed for reasons that are by now obvious. But the United States did not appeal . . . . When the time for appeal expired, so did any possibility for correcting the error.").

found that the departure was unlawful and that the district court used the wrong base level offense. *Id.* But it did not vacate the sentence and order its enlargement on remand. Instead, the court held that "because the government filed no cross-appeal, it cannot obtain a sentence more favorable than that already imposed." *Id.* at 1326. Thus, even though the sentence was vacated and remanded on other grounds, the Third Circuit held that "because the government did not file a cross-appeal" the district court was constrained on remand to issue a sentence no greater than that originally imposed. *Id.* at 1330. *See also United States v. Lieberman*, 971 F.2d 989, 997 n.5 (3d Cir. 1992) (noting in a criminal case that "a party may not seek more extensive relief on appeal than it received in district court without filing a cross-appeal").

In *United States v. Whaley*, 148 F.3d 205, 207 (2d Cir. 1998), the Second Circuit considered an appeal by a criminal defendant in which the Government argued that the defendant's "sentence was illegal and [that] we should vacate and remand for resentencing *de novo*." While the court agreed that the sentence should have been longer under a correct application of the law, it nonetheless held that it was "precluded from remanding for resentencing because we lack jurisdiction over [the] sentence" given that the Government never filed an appeal or cross-appeal. *Id.*

The Fourth Circuit likewise refused to consider an increase in the defendant's sentence absent a Government cross-appeal in *United States v. Luskin*, 926 F.2d 372 (4th Cir. 1991). In that case, the defendant was convicted on multiple counts related to an attempted murder plot and on three counts of carrying a gun in relation to a crime of violence. Under 18 U.S.C. § 924(c), the sentences on the gun counts should have been made consecutive to the murder-related counts and to each other. However, the district court ordered concurrent sentences. *Id.* at 374 n.2. On the defendant's appeal, the Fourth Circuit noted the district court's likely error. *Id.* "However," the court concluded, "since the United States has not counter-appealed on this point, we will not

address it." *Id.* Numerous other decisions have likewise refused to consider increases in a criminal sentence absent a Government appeal.[7] While these cases have not necessarily expressed their conclusions in absolute or jurisdictional terms,

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[7] *See, e.g., United States v. Guzman*, 225 Fed. Appx. 496, 497 n.3 (9th Cir. 2007) ("We will not consider the government's suggestion that the prison sentence itself should be revisited and increased. The government did not cross appeal.") (citing *Neztsosie*, 526 U.S. at 479); *United States v. Santana-Mendoza*, 29 Fed. Appx. 613, 613-614 (1st Cir. 2002) (observing that district court grossly undercounted the loss caused by the defendant's conduct for sentencing purposes, but holding that "[b]ecause the government did not cross-appeal in this case, however, we decline to remand for resentencing"); *United States v. Gonzalez-Vazquez*, 219 F.3d 37, 44 (1st Cir. 2000) (declining to correct error that unlawfully decreased a defendant's sentence because "the government did not cross-appeal"); *United States v. Brock*, 211 F.3d 88, 93 (4th Cir. 2000) (refusing to consider whether district court applied proper base level offense because "the Government did not cross-appeal" the issue); *United States v. Waks*, No. 98-50531, 1999 WL 450857, *1 n.3 (June 28, 1999 9th Cir.) (unpublished) (refusing to consider Government's assertion that district court undercounted the amount of funds derived from offense for sentencing calculation "because the government did not cross-appeal on this issue"); *United States v. Night*, 29 F.3d 479, 481 n.2 (9th Cir. 1994) ("The enhancement term under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Here, the district court imposed concurrent terms. Because the government did not cross appeal, however, we do not consider the issue.") (citation omitted); *United States v. Miller*, 910 F.2d 1321, 1324 n.2 (6th Cir. 1990) ("The government's failure to appeal precludes us from reviewing the district court's decision to depart downward from the 63 to 78-month guideline range."); *United States v. Turner*, 898 F.2d 705, 711 (9th Cir. 1990) ("[B]ecause the government failed to contest Turner's sentence on appeal pursuant to 18 U.S.C. § 3742(b) (Supp. V 1987), it has waived any challenge to the district court's miscomputation of Turner's sentence in his favor.") (citation omitted).

they nonetheless leave little room to doubt that petitioner's sentence would not have been increased in those circuits given the Government's failure to cross-appeal his sentence.

3. Finally, the Fifth Circuit has been inconsistent. In *United States v. Coscarelli*, 149 F.3d 342 (5th Cir. 1998) (en banc), the court refused to consider an argument by a criminal defendant seeking a reduction in his sentence because he had failed to file a cross appeal. The requirement of a timely notice of appeal, the court held, is "mandatory and jurisdictional." *Id.* at 343 (citation omitted). Accordingly, because the defendant had filed "no notice of appeal or cross-appeal" the Fifth Circuit held that "an appellate court simply has no authority to grant [the defendant] relief that would expand his rights under the judgment." *Id.* However, in an earlier case not cited in *Coscarelli*, the Fifth Circuit *sua sponte* vacated a criminal sentence in the absence of an appeal or cross-appeal from the Government, when the court concluded that the sentence did not comply with a statutory mandatory minimum. *See United States v. Schmeltzer*, 960 F.2d 405, 407 (5th Cir. 1992). Accordingly, it appears that the case law in the Fifth Circuit presently stands for the untenable proposition that a court of appeals may revise a sentence in favor of the Government without a cross-appeal, but may not remedy a sentencing error to benefit a non-appealing criminal defendant.[8]

B. The Conflict In This Case Also Implicates A Broader Unresolved Division Over The Jurisdictional Status Of The Cross-Appeal Requirement.

The circuit conflict over a court of appeal's ability to correct a sentencing decision that favored a defendant without a Government cross-appeal reflects a broader disagreement

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[8] *See also Marts v. Hines*, 117 F.3d 1504, 1508-11 (5th Cir. 1997) (en banc) (Garwood, dissenting) (cataloguing inconsistent decisions within the circuit).

over whether the cross-appeal requirement is a limitation on appellate jurisdiction or, instead, a rule of practice subject to exception in appropriate cases. In *Neztsosie*, this Court recognized that conflict, noting that this "issue has caused much disagreement among the Courts of Appeals and even inconsistency within particular Circuits for more than 50 years." 526 U.S. at 480 n.2 (collecting cases). However, there was no need to decide the question in *Neztsosie*, *id.* at 480, and so the conflict persisted. Three years later, this Court granted certiorari to resolve the question in *Zapata Industries v. W.R. Grace & Company*, 536 U.S. 990 (2002). Again, however, the Court was unable to resolve the dispute, this time because the parties reached a settlement and dismissed the petition. *See* 537 U.S. 1025 (2002).

This case presents the Court with an opportunity to finally resolve this long-standing and far-reaching conflict once and for all. If the cross-appeal requirement is a "mandatory, jurisdictional requirement," *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408, 1416 (7th Cir. 1989), as petitioner contends, the Eighth Circuit lacked jurisdiction to enlarge petitioner's conviction without a Government cross-appeal, regardless of how plain the error or serious the perceived miscarriage of justice. On the other hand, if the requirement is simply a rule of practice, there is room for argument that a court may properly correct a district court's application of a statutory mandatory minimum sentence. Litigants and the lower courts would benefit greatly from knowing whether such exception are ever permitted.

C. This Case Also May Provide The Court An Opportunity To Resolve A Long-Standing Confusion Over Whether Fed. R. Crim. P. 52(b) Applies To Objections Forfeited By The Government.

Were this Court to conclude that the cross-appeal requirement is subject to exception, the Court would then have an opportunity to resolve the additional conflict and

confusion over whether the "plain error" doctrine applies to excuse forfeiture of objections by the Government.

The Eighth and Tenth Circuits justified their disregard of the cross-appeal requirement by reference to Fed. R. Crim. P. 52(b), which provides that a "plain error that affects substantial rights may be considered even though it was not brought to the court's attention." *See* Pet. App. 9a-10a; *Moyer*, 282 F.3d at 1318-19. However, "[t]he courts are split on whether the government can ever take advantage of Rule 52(b) to raise an issue for the first time on appeal." Hutchinson, Hoffman, Young & Popko, FED. SENT. L. & PRACT. § 11.8 (2007 ed.) (collecting cases). Commentators and courts have described the division as pitting the Fifth and Eighth Circuits against the majority of courts, which have held that Rule 52(b) applies to excuse Government forfeitures. *See id.* (citing *United States v. Garcia-Pillado*, 898 F.2d 36, 39 (5th Cir. 1990), and *United States v. Filker*, 972 F.2d 240, 242 (8th Cir. 1992)); *United States v. Dickerson*, 381 F.3d 251, 257 (3d Cir. 2004) (citing *Garcia-Pillado* and *United States v. Posters 'N' Things, Ltd.*, 969 F.2d 652, 663 (8th Cir. 1992)); *United States v. Rodriguez*, 938 F.2d 319, 322 n.4 (1st Cir. 1991) (citing *Garcia-Pillado*). However, there are now cases from both the Fifth and Eighth Circuits (including this one) applying the plain error rule to reach forfeited Government objections. *See* Pet. App. 9a n.5; *United States v. Avants*, 278 F.3d 510, 521 & n.12 (5th Cir. 2002); *United States v. Kelly*, 961 F.2d 524, 528 (5th Cir. 1992). The confused state of the case law within these circuits reinforces the need for review by this Court.

II. The Division Of Authority Is Long-Standing, Intractable, And Ready For Resolution By This Court.

The conflict presented by this case is considered and entrenched. The Eighth Circuit expressly acknowledged the conflict with the Seventh Circuit but decided, instead, join the Tenth Circuit in holding that plain sentencing errors may be

corrected *sua sponte*. *See* Pet. App. 9a-10a n.5. The court further denied a petition for rehearing that again noted the intercircuit conflict. *See* Pet. for Rehearing or Rehearing En Banc by Appellant 10-11. At the same time, in *Rivera*, the Seventh Circuit expressly rejected the Fifth Circuit's prior decision in *Schmeltzer*, concluding that it was inconsistent with this Court's more recent pronouncement in *Neztsosie*. *See Rivera*, 411 F.3d at 867. Since then, the Seventh Circuit has repeatedly enforced its cross-appeal requirement. See n. 6, *supra*. There is no genuine prospect that any of these circuits will reverse position on its own. Indeed, as time has passed, the division has grown wider, not narrower. Only intervention by this Court will resolve the conflict.

Such intervention is badly needed, as the present disparate treatment of similarly situated criminal defendants is untenable. There is no question that if petitioner had brought his appeal in the Seventh Circuit, for example, his sentence would now be *fifteen years* less than it is now, solely because he had the misfortune of finding himself in a circuit that has disregarded the long-standing majority rule. While the court of appeals justified its action in part by reference to the need to protect the "public reputation of judicial proceedings," Pet. App. 9a, the vastly disparate treatment of similarly situated citizens based on accidents of geography undermines the public reputation of the federal criminal justice system as well.

Finally, this case presents an ideal vehicle for resolving the conflict – the question presented was squarely addressed by the court of appeals, whose resolution of the issue determined the outcome of the case. *See* Pet. App. 9a-10a.

III. The Court Of Appeals' Decision Conflicts With The Decisions Of This Court And The Statutory Scheme Congress Established To Govern Criminal Appeals On Behalf Of The Government.

Certiorari is further warranted because the decision below is wrong, disregarding both the limits Congress has

placed upon courts of appeals' jurisdiction and the legislature's decision to bestow discretion upon the Attorney General and the Solicitor General – not the courts of appeals – to decide which sentencing errors benefiting a defendant should be presented for potential correction on appeal.

1. "Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Bowles v. Russell*, 127 S.Ct. 2360, 2365 (2007). Since the earliest days of the Republic, Congress has limited the courts of appeals' jurisdiction to cases in which the party seeking revision of a judgment has filed a timely notice of appeal. *See* Act of Mar. 3, 1891, ch. 517, §§ 6, 11, 26 Stat. 826, 826, 829 (statute creating federal appellate courts and establishing scope of jurisdiction); 28 U.S.C. § 2107(c) (2007) (modern requirement of notice of appeal).

Accordingly, just last Term, this Court reaffirmed that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" *Bowles*, 127 S.Ct. at 2463.[9] Obviously, the failure to take any appeal at all is no less a jurisdictional defect than taking an appeal out of time. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314-15 (1988) (holding that failure to name co-plaintiffs in notice of

[9] The jurisdictional nature of the notice of appeal requirement is further reinforced by the Federal Rules of Appellate Procedure. *See* Fed. R. App. P. 3(a)(1) ("An appeal permitted by law as of right from a district court to a court of appeals may be taken *only by filing a notice of appeal* . . . .") (emphasis added); Fed. R. App. P. 3(a)(2) ("An appellant's failure to take any step *other than the timely filing of a notice of appeal* does not affect the validity of the appeal . . . .") (emphasis added); Fed. R. App. P. 2 (permitting courts to suspend rules, except as provided in Rule 26(b)); Fed. R. App. P. 26(b)(2) (prohibiting extension of time to file notice of appeal).

appeal "constitutes a failure of the party to appeal" and refusing to allow courts of appeals "to exercise jurisdiction over parties not named in the notice of appeal").

The rule applies with equal force to sentencing appeals by the Government. In *United States v. Robinson*, 361 U.S. 220, 224 (1960), this Court held that holding that "the filing of a notice of appeal" within the time permitted by the federal rules "is mandatory and jurisdictional" in a criminal case. Indeed, the specific statute authorizing sentencing appeals by the Government, like the general appeals statute this Court has repeatedly construed as imposing a jurisdictional requirement, provides that a Government appeal shall be initiated by the filing of a notice of appeal. *Compare* 18 U.S.C. § 3742(b)(1) ("Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence ... was imposed in violation of law.") *with* 28 U.S.C. § 2107(a) (providing that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed . . . .").

The jurisdictional requirement of a timely notice of appeal does not abate simply because the opposing party also has appealed from the same judgment. *See generally Marts*, 117 F.3d at 1511-1518 (Garwood, J., dissenting). The federal statutes governing appellate jurisdiction make no distinction between appeals and cross-appeals, requiring instead a timely notice of appeal in all cases in which a party seeks review of a district court's judgment. *See* 28 U.S.C. § 2107(a); 18 U.S.C. § 3742(b)(1). While the Federal Rules of Appellate Procedure allow additional time for the filing of a cross-appeal, they require a timely notice of appeal for cross-appellants in no less stringent terms than for the original appealing party. *Compare* Fed. R. App. P. 4(a)(1) *with* Fed. R. App. P. 4(a)(3). Moreover, while some courts once held that the filing of a timely notice of appeal by any party gave the court of appeals jurisdiction over the entirety of the judgment, *see, e.g., Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d

468, 476 (8th Cir. 1977), that misconception was corrected by this Court in *Torres*, which held that an appeal by some plaintiffs was insufficient to confer jurisdiction upon the court of appeals to disturb the judgment entered against a non-appealing co-plaintiff. *See* 487 U.S. at 314-18.

Thus, an appellee's failure to file a timely notice of cross-appeal has jurisdictional consequences, limiting the power of the reviewing court to revise the judgment below, even upon a showing of very clear error. "Without a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record,'" but "[w]hat he may not do in the absence of a cross-appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.'" *Morely Const. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191 (1937) (quoting *United States v. Am. Ry. Express*, 265 U.S. 425 (1924)).

Nor may the court of appeals enlarge the judgment in favor of a nonappealing party on its own accord, however inequitable it may seem to leave the error uncorrected. *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 480, 480 (1999) (reversing court's *sua sponte* enlargment of judgment); *see also Bowles*, 127 S.Ct. at 2366 (holding that "this Court has no authority to create equitable exceptions to jurisdictional requirements"). Certainly, nothing in Rule 52(b) authorizes such action. By its plain terms, the Rule does not purport to affect the scope of appellate jurisdiction. *See* Fed. R. Crim. P. 52(b). And, in fact, the Rule would be invalid if it did.[10]

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[10] As originally enacted, the Rules Enabling Act permitted only the promulgation of "general rules of practice and procedure," 28 U.S.C. § 2072(a), not substantive rules enlarging or restricting jurisdiction. Congress subsequently amended the Act to permit this Court to "define when a ruling of a district court is final for the purposes of appeal under section 1291." 28 U.S.C. § 1072(c). That limited delegation of authority to define the scope of appellate

Accordingly, the Eighth Circuit lacked jurisdiction to increase petitioner's sentence, either upon request of the Government or its own initiative.[11]

2. Proper respect for Congress's authority to establish the prerequisites for appellate review requires strict observance of the cross-appeal requirement in all cases, civil and criminal. However, in the criminal context there is added reason to deny courts of appeals the authority to order increases in criminal sentences when the Government has declined to bring its own appeal. The statute authorizing Government appeals of criminal sentences expressly provides that after filing a notice of appeal, the "Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." 18 U.S.C. § 3742(b).[12] The purpose of this restriction is to assure that such appeals are not routinely filed, lest the courts be inundated by appeals from local federal prosecutors dissatisfied by sentences in particular cases. *See* S. Rep. No. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3337; *cf. United States v. Providence Journal Co.*, 485 U.S. 693, 702 & n.7 (1988) (commenting on Solicitor General's parallel role in approving Government petitions for certiorari).

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jurisdiction marks the outer limits of the Rules' effect on the jurisdiction of the federal courts of appeals.

[11] Even if the cross-appeal requirement were not considered strictly jurisdictional, the Eighth Circuit nonetheless erred in disregarding it. "[I]n more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of [this Court's] holdings has ever recognized an exception to the rule." *Neztsosie*, 526 U.S. at 480. As discussed next, the context of Government sentencing appeals is a particularly inappropriate area in which to invent, for the first time, an exception to this long-standing rule.

[12] The Attorney General has delegated his authority to authorize appeals to the Solicitor General. *See* 28 C.F.R. §0.20(b).

Congress plainly understood that a consequence of this limitation would be that some unlawful sentences would be allowed to stand uncorrected, even when, in the opinion of a court, it might be "judicially efficient for [the court] to address the error." Pet. App. 9a. *Cf. United States v. Mendoza*, 464 U.S. 154, 161 (1984) ("Unlike a private litigant who generally does not forego an appeal if he believes he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the government and the crowded dockets of the courts, before authorizing an appeal."). Congress determined that top officials at the Department of Justice, not members of the judiciary, should be charged with the responsibility for deciding which sentencing rulings adverse to the Government should be candidates for possible correction on appeal. Allowing a court of appeals to nonetheless consider errors that the Solicitor General has chosen not to pursue on appeal – either entirely *sua sponte* or based on subtle (or not so subtle) suggestions by government attorneys denied authority to appeal the district court's order directly – would undermine the allocation of authority established by Congress.

In this case, the Solicitor General plainly did not conclude that any error unlawfully reducing petitioner's sentence was worthy of correction through a Government appeal or cross-appeal.[13] The court of appeals' disregard for that decision should be corrected by this Court.

3. Finally, even if the courts of appeals had authority to revise a criminal sentence in favor of a non-appealing party in cases of plain error under Fed. R. Crim. P. 52(b), that authority would have no application to this case for the simple reason that the Rule does not apply to revive objections forfeited by the Government. By its express terms, the Rule allows a court to correct a plain error only if the error "affects

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[13] It is, of course, too late for the Solicitor General to authorize an appeal now. *See* Fed. R. App. P. 4(b)(1)(B); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98-99 (1994).

substantial rights." Fed. R. Crim. P. 52(b). While the United States surely has important *interests* at stake in a criminal prosecution, the Government does not have "substantial rights" as that term is most naturally understood in the context of these rules. *See United States v. Barajas-Nunez*, 91 F.3d 826, 835-36 (6th Cir. 1996) (Siler, J., concurring in part and dissenting in part). For example, Rule 11 provides that "variance from the requirements of this rule is harmless error if it does not affect *substantial rights*," Fed. R. Crim. P. 11(h) (emphasis added), plainly referring solely to the substantial rights of a criminal defendant. *See* Fed. R. Crim. P. 11(b)(1) (requiring court to inform defendant of a panoply of rights prior to accepting guilty plea). Rule 7 similarly uses essentially the same term – "substantial right" – in a manner that likewise leaves no room for doubt that it refers solely to the rights of the defendant. *See* Fed. R. Crim. P. 7(e) ("Unless an additional or different offense is charged or a *substantial right of the defendant* is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.") (emphasis added).

Even if a sentencing error benefiting a defendant could be said to "affect[] substantial rights," Fed. R. Crim. P. 52(b), it nonetheless would be inappropriate for a court of appeals to exercise its discretion to correct it, especially in the absence of an express request to do so by the Government. It is one thing for a court to consider an argument made by the Government in a properly-authorized appeal when the prosecution failed to make an objection in the trial court. However, it is quite another for a court to *sua sponte* correct an error in a judgment the Government as chosen not to appeal. Given that Congress has expressly authorized the Government to decline to appeal an unlawful sentence, and given the historic understanding that the failure to take such an appeal would bar consideration of the error on appeal, it simply cannot be said that correction of the unchallenged error is necessary to ensure the "fairness, integrity or public

reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993) (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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September 7, 2007

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 05-3391

United States of America, *
Appellee, *
v. *
LaQuan Dwayne Carter, also known *
as "Quan," also known as "Q-Ball," *
Appellant. *

Nos. 06-1365

United States of America, *
Appellee, *
v. *
Michael Greenlaw, also known *
as "Mikey," *
Appellant. *

Appeal from the United States District Court for the District of Minnesota.

Submitted: September 26, 2006
Filed: March 23, 2007

Before MURPHY, HANSEN, and RILEY, Circuit Judges.

RILEY, Circuit Judge.

The district court sentenced Michael Greenlaw (Greenlaw) to 442 months' imprisonment and LaQuan Carter (Carter) to 405 months' imprisonment following their convictions on drug and firearms charges, in violation of 21 U.S.C. § § 841(a)(1), (b)(1)(A) and (B) and 846, and 18 U.S.C. § § 924(c) and (o), 1959 and 1961. In this consolidated appeal, Greenlaw appeals the district court's (1) denial of his motion to sever the trial, (2) denial of his request to represent himself, and (3) sentence of 442 months' imprisonment. Carter appeals the district court's (1) denial of his Batson challenge,[1] and (2) finding that sufficient evidence supported his conviction of conspiracy to distribute crack cocaine. For the reasons stated below, we vacate Greenlaw's sentence and remand to the district court for resentencing. In all other respects, we affirm the judgment of the district court.

I. BACKGROUND

Greenlaw and Carter belonged to a gang named the "Family Mob," which sold crack cocaine on the south side of Minneapolis. From 1996 until his arrest in 1999, Norman Toney (Toney) supplied the Family Mob with cocaine, which Family Mob members cooked into crack cocaine and sold on the streets.

Family Mob members used their collective efforts to sell an estimated two to three kilograms of crack cocaine per week. For example, one member would hold the crack, another would hold the money, another would carry a gun for security purposes, and another would serve as lookout.

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Family Mob members hid the crack cocaine near them while on the street rather than carry it on their person or carried the crack in their mouths to be swallowed if police approached. They also hid guns in others' houses and basements to avoid being caught in possession of the firearms. Family Mob members discussed the location of these guns so the guns were available to them when needed.

The Family Mob established and defended a territory in south Minneapolis to sell crack cocaine. When the presence of Family Mob members alone was not enough to keep competitors out of their territory, the members employed intimidation and violence to defeat competition. For example, James Hicks (Hicks), a Family Mob member, testified that, on May 10, 1997, Carter and other Family Mob members were on the south side of Minneapolis dealing drugs when a confrontation with nonmembers occurred. According to Hicks, when the non-members returned to the area, Carter responded by firing a gun at their car.

Another incident occurred in October 1998, when Robert Lewis (Lewis), a member of a rival gang, the "Bogus Boys," shot and killed Family Mob member Daryl Bellamy (Bellamy). Family Mob member Everett Jones (Jones) testified he and Greenlaw responded by dynamiting Lewis's home. Hicks explained the Family Mob had to respond to Bellamy's death because otherwise "[m]ore people would have been coming over where we at trying to cause us bodily harm. Trying to shoot us, take guys' money, our drug clientele."

After the arrests of several Family Mob members, police recovered numerous weapons, including a .9 millimeter handgun with laser sight, an AR-15 rifle, a .40 caliber handgun, a Davis .38 caliber handgun, a "ball and cap revolver," a .20 gauge sawed-off shotgun, a .44 magnum, a .45 semi-automatic handgun, a .9 millimeter semi-automatic handgun, a .38 caliber pistol, a .9 millimeter Luger, and a

Tech .9 millimeter handgun. In addition, police recovered approximately 240 grams of crack cocaine and nearly two kilograms of cocaine.

Eight defendants were indicted on various drug and firearm charges. Six of the defendants pled guilty, but Carter and Greenlaw elected a jury trial. The counts against both Carter and Greenlaw included conspiracy to distribute in excess of fifty grams of crack cocaine and conspiracy to possess firearms during and in relation to a drug trafficking crime. Greenlaw's charges also included two counts of carrying a firearm during and in relation to a drug trafficking crime and one count of carrying a firearm during a crime of violence.[2]

Following a two-week joint trial, the jury returned verdicts of guilty against both Carter and Greenlaw on all counts except one. Greenlaw was acquitted on one of two counts of carrying a firearm during a drug trafficking crime.

II. DISCUSSION

A. Greenlaw's Motion to Sever

Greenlaw first argues the district court erred in denying his motion to sever the trials. Greenlaw moved for severance of the trials during a pretrial hearing. The district court denied his request. Greenlaw did not renew his motion at the close of the government's case or at the close of all the evidence. Because of this omission, we review the denial of the motion for plain error. *United States v. Haskell*, 468 F.3d

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[2] Greenlaw was charged also with one count of conspiracy to commit a violent crime in aid of racketeering and two counts of a violent crime in aid of racketeering. Carter was charged also with one count of aiding and abetting distribution in excess of five grams of crack cocaine and one count of a violent crime in aid of racketeering.

1064, 1070 (8th Cir. 2006).[3] We will "reverse only if there was misjoinder which had a substantial and injurious effect or influence on the verdict." *Id.*

Greenlaw contends severance was necessary because the jury was unable to compartmentalize the evidence. Greenlaw claims he was unfairly prejudiced in a complex case of multiple separate criminal acts by evidence relevant only to Carter. Greenlaw specifically points to the testimony of Tasha Humphries (Humphries), who testified Carter shot her boyfriend. Because Humphries failed to state Greenlaw was not present during that incident, and because Greenlaw and Carter were sitting next to each other in the courtroom, Greenlaw contends the jury may have improperly considered Humphries's testimony against him.

However, Greenlaw was never charged with the shooting. Humphries's testimony applied only to Carter, did not implicate Greenlaw in any way, and did not prevent Greenlaw from presenting a defense. *Id.* Greenlaw fails to demonstrate the jury was unable to compartmentalize this evidence as it related to Greenlaw and Carter. To the contrary, the fact Greenlaw was acquitted on one of the charges against him, i.e., carrying a firearm during a drug trafficking crime, indicates the jury considered the evidence against each defendant separately. Here, the district court did

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[3] As the *Haskell* decision recognized, the standard of review applicable to the denial of a severance motion has been a subject of debate. *Haskell*, 468 F.3d at 1070 n. 3. *United States v. Mathison*, 157 F.3d 541, 546 (8th Cir. 1998), as did *Haskell*, adopted a plain error standard of review. But, *United States v. Flores*, 362 F.3d 1030, 1039 n. 4 (8th Cir. 2004), adopted an abuse of discretion standard "in light of the purposes for requiring the motion's renewal." (quotation omitted). Regardless, whether we review the district court's decision for plain error or for abuse of discretion, the outcome in this case remains the same.

not abuse its discretion or plainly err in denying Greenlaw's severance request.

B. Greenlaw's Request for Self-Representation

Greenlaw also argues the district court erred in denying his request to represent himself at trial. We do not agree. Before the court can consider if a defendant may represent himself, the defendant is required to make a clear and unequivocal request for self-representation. *United States v. Light*, 406 F.3d 995, 998-99 (8th Cir. 2005).

Here, the government claims Greenlaw never made a clear and unequivocal request for self-representation. Greenlaw, however, contends the following exchange shows otherwise:

> **The Court:** Are [your motions] having to do with getting a new lawyer? Are you asking to represent yourself or what are you going to do?
>
> **Greenlaw:** No, I'm asking to be a co-counsel, to be appointed with a different attorney and also be a co-counsel.
>
> **The Court:** What do you mean by "a co-counsel?"
>
> **Greenlaw:** To be entitled to all evidence that's being used against me, for my records, so I can prepare myself for trial.

Based on this colloquy, as well as prior demands for new counsel, Greenlaw argues he made a clear and unequivocal request to represent himself. However, the record and these arguments fail to show a *clear and unequivocal* request for self-representation. Greenlaw never adequately invoked his right to self-representation. *Id.* at 999.

C. Greenlaw's Sentence

Greenlaw further claims the district court erred in sentencing him to 442 months' imprisonment. First, Greenlaw argues the district court erred by denying his motion for downward departure. Greenlaw specifically

contends his criminal history was overstated and should have been category II instead of category III. However, Greenlaw does not assert the district court failed to recognize it had the authority to depart, and nothing in the record suggests the district court was unaware of its authority to depart. *See United States v. Andreano*, 417 F.3d 967, 970 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 1118 (2006) (holding "[t]he discretionary denial of a motion for downward departure is unreviewable unless the court failed to recognize its authority to depart."). Consequently, on this record, the district court's discretionary denial of a motion for downward departure is unreviewable.

Greenlaw next argues the district court erred in sentencing him to 442 months. Greenlaw contends the district court abused its discretion and he should have received only a 15-year sentence. We disagree. An abuse of discretion occurs if the district court failed to consider a relevant factor that should have received significant weight, gave significant weight to an improper or irrelevant factor, or considered only appropriate factors but committed a clear error of judgment in weighing those factors. *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir.), *cert. denied*, 126 S.Ct. 276 (2005). Greenlaw does not indicate what factors the court failed to consider or should have considered to arrive at a 15-year sentence. Greenlaw makes only vague assertions regarding his "age and historical characteristics" which do not establish the district court abused its discretion.

Here, based on a total offense level of 38 and a criminal history category III, the district court calculated an advisory Guidelines range of 292 to 365 months' imprisonment. The district court gave Greenlaw credit for 62 months already served on state drug-related charges. Thereafter, the district court sentenced Greenlaw to a concurrent 262 months' imprisonment for Count 1 (conspiracy to distribute crack cocaine), Count 2 (conspiracy to possess firearms in relation to a drug trafficking crime), Count 5 (conspiracy to assault

with a dangerous weapon), and Counts 6 and 8 (assault with a dangerous weapon).[4]

We note, however, when considering Counts 4 and 10, which involved possession of firearms under 18 U.S.C. § 924(c), the district court committed an error. The district court sentenced Greenlaw consecutively to 5 years' imprisonment for Count 4 and to 10 years' imprisonment for Count 10. However, 18 U.S.C. § 924(c)(1)(A)(i) and (C)(i) require a 5-year sentence on Count 4 to be served consecutively to the 262-month sentence, and a 25-year sentence on Count 10 to be served consecutively to the total sentence after factoring in Count 4.

Under 18 U.S.C. § 924(c)(1)(C), "[i]n the case of a second or subsequent conviction under this subsection, the person shall ... be sentenced to a term of imprisonment of not less than 25 years." Greenlaw's conviction under Count 10 was his second conviction under the statute. Thus, under § 924(c)(1)(C), Greenlaw should have been sentenced consecutively to the mandatory minimum sentence of 25 years for Count 10.

The district court determined Count 10 was not a second or subsequent conviction under § 924(c)(1)(C) because Greenlaw was only "convicted" at the entry of judgment of conviction. However, the Supreme Court has declared "[i]n the context of § 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of final judgment of conviction." *Deal v. United States*, 508 U.S. 129, 132 (1993). Contrary to the district court's reasoning, Greenlaw was convicted when the jury found him guilty of Count 10, not at

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[4] The district court arrived at this number by sentencing Greenlaw to 262 months for Count 1, 240 months each for Counts 2, 6, and 8, and 36 months for Count 5, all to be served concurrently.

the entry of final judgment of conviction. Greenlaw's total sentence should include the mandatory consecutive 25 years under § 924(c)(1)(C), in addition to the mandatory consecutive 5-year sentence for Count 4.

The government did object to this error at sentencing, but did not appeal the issue. Because this error seriously affects substantial rights and the fairness, integrity, and public reputation of judicial proceedings and because we think it is judicially efficient for us to address the error, we exercise our discretion under Fed.R.Crim.P. 52(b)[5] and find the district

---

[5] *See Silber v. United States*, 370 U.S. 717 (1962) ("'In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936))); *United States v. Granados*, 168 F.3d 343, 346 (8th Cir. 1999) (per curiam) ("The Supreme Court and this court have recognized in criminal cases that appellate courts can examine a critical issue affecting substantial rights sua sponte under Fed.R.Crim.P. 52(b)."); *see also United States v. Baugham*, 449 F.3d 167, 170 (D.C.Cir. 2006) ("[T]his court in any event has the power to notice a plain error sua sponte" (citing *Silber*, 370 U.S. at 718)); *United States v. Moyer*, 282 F.3d 1311, 1313, 1317-19 (10th Cir. 2002) (recognizing the court had the power to correct the imposition of an illegal sentence sua sponte). As we have noted above, fairness concerns run both ways. *See United States v. Cotton*, 535 U.S. 625, 634 (2002) ("The real threat then to the 'fairness, integrity, and public reputation of judicial proceedings' would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial."). *But see United States v. Rivera*, 411 F.3d 864, 867 (7th Cir.) (refusing to correct sentence that was below the statutory mandatory minimum because "[b]y deciding not to take a cross-appeal, the United States

court plainly erred in excluding the statutory mandatory sentence under Count 10. *See United States v. Barnett*, 410 F.3d 1048, 1050-51 (8th Cir. 2005) (finding the district court's failure to impose a consecutive sentence under 18 U.S.C. § 924(c) was "an error [that] affected the substantial rights of the government and people of the United States to have defendants sentenced in accordance with governing law.... The public reputation of criminal trials and of sentencing would certainly be undermined if we were to decline to correct a clear error of law that would result in [a defendant] serving a sentence of five years less than that required by law."); *United States v. Campos*, 362 F.3d 1013, 1014 n. 1 (8th Cir. 2004) ("[W]e have previously held that an error which lengthened a defendant's sentence by 21 months was a miscarriage of justice and we think that the result should be the same when an error shortens a defendant's sentence by an equal or greater amount.... It goes without saying that both the defendant and the people of the United States are entitled to equal justice." (internal citation omitted)). This error shortened Greenlaw's sentence by a statutorily mandated additional 180 months, which sentence is contrary to law and a miscarriage of justice.[6]

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has ensured that [the defendant's] sentence cannot be increased"), *cert. denied*, 126 S.Ct. 493 (2005).

[6] We also note the district court erred in concluding that, without a jury finding (citing *United States v. Booker*, 543 U.S. 220 (2005)), it could not make a finding with respect to whether Greenlaw possessed a firearm in connection with Count 1. The district court said: "I just don't think under *Booker* I can make that determination." Contrary to the district court's assertion, the district court can make that determination under *Booker* when calculating an advisory Guideline range. *See United States v. Sandoval-Rodriguez*, 452 F.3d 984, 990-91 (8th Cir. 2006). The government objected to this *Booker* error, but did not appeal the error. Under plain error review, an error must be plain, affect substantial rights, and seriously affect the fairness, integrity, or

D. Carter's *Batson* Motion

Carter contends the district court erred in overruling his Batson challenge of the government's peremptory strike of the sole minority member[7] of the jury pool. Batson challenges are evaluated under a three-part analysis. United States v. Blaylock, 421 F.3d 758, 769 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 1108 (2006). First, a defendant must make a prima facie showing that the prosecutor has stricken a potential juror because of race. Second, if such a showing is made, the burden shifts to the prosecutor to articulate a race neutral explanation for striking the prospective juror. Third, the district court must decide the ultimate question of whether or not the defendant has proven purposeful discrimination.[8] *Id.*

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public reputation of judicial proceedings. *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Pirani*, 406 F.3d 543, 550 (8th Cir.) (en banc), *cert. denied*, 126 S.Ct. 266 (2005). The § 924(c)(1)(C) error we recognize today as plain is triggered primarily because the error violates a Congressional mandate. This *Booker* error does not. Based on the unique circumstances of this sentencing, we conclude this *Booker* error does not affect substantial rights or seriously affect the fairness, integrity or public reputation of the judicial proceedings. The district court treated the Sentencing Guidelines as advisory and, in a separate exercise of our plain error review discretion, we determine "the effect of the error on the result in the district court is uncertain or indeterminate-where we would have to speculate" as to how the error affected the substantial rights of the parties. *See Pirani*, 406 F.3d at 553 (quoting *United States v. Rodriguez*, 398 F.3d 1291, 1301 (11th Cir.), *cert. denied*, 545 U.S. 1127 (2005)). Therefore, exercising our Rule 52(b) power "sparingly," we do not find the district court's *Booker* error was plain error. *See Jones v. United States*, 527 U.S. 373, 389 (1999).

[7] This veniremember had a Hispanic surname. Carter is black and not Hispanic.

[8] At the third stage, the question may be framed in terms of pretext. However, "[u]nless a discriminatory intent is inherent in

The district court's ultimate finding on the issue is set aside only if clearly erroneous. Id. "If there is no inherently discriminatory intent in the prosecutor's explanation, the reason offered will be deemed race neutral." *United States v. Roebke*, 333 F.3d 911, 913 (8th Cir. 2003) (quotation marks and citation omitted).

Here, we focus on the second step of the analysis because the government, by offering a race neutral explanation, in effect, excused Carter from establishing a prima facie case of racial discrimination. *See id.* Thus, the court must determine whether the government articulated a race neutral explanation for striking the minority veniremember.

The government first claims this veniremember was stricken from the panel because of his employment with the postal service and argues many postal employees are unhappy with the government. On appeal, Carter attempts to show this reason was merely a pretext by pointing to a similarly situated juror who was employed by the government as an air traffic controller but was not stricken from the panel. However, because Carter never made this "similarly situated" argument before the district court, he cannot raise it for the first time on appeal. *United States v. Gibson*, 105 F.3d 1229, 1232 (8th Cir. 1997) (holding a "similarly situated" juror argument must be made at the trial level and is untimely if it is raised for the first time on appeal).

Nevertheless, the veniremember's employment is not the sole reason the government struck this person from the panel. The government also chose to strike this veniremember because his nearly empty questionnaire showed a lack of interest in the process. Lack of interest in the process is a

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the prosecutor's explanation, the reason offered will be deemed race neutral." *See United States v. Meza-Gonzalez*, 394 F.3d 587, 593 (8th Cir. 2005) (quoting *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995)).

valid, race neutral reason to strike a juror. *See United States v. Jenkins*, 52 F.3d 743, 747 (8th Cir. 1995). Based on the veniremember's short and vague answers to his questionnaire, the district court determined no discriminatory intent was inherent in the government's explanation to strike this veniremember. We give deference to the district court on its finding that the government's reasons for striking the veniremember were race neutral and not pretextual. *See United States v. Pherigo*, 327 F.3d 690, 696 (8th Cir. 2003).

Carter contends the district court rushed its ruling without affording him the third step of the relevant inquiry, i.e., to show the government's explanation was pretextual. However, nothing in the record indicates the district court failed to assess whether the reason offered by the government to strike this veniremember was a valid race neutral reason. As a result, the district court's finding that the government had a valid race neutral reason to strike the veniremember is not clearly erroneous.

E. Carter's Sufficiency of the Evidence Challenge

Carter argues insufficient evidence exists to support his conviction for conspiracy to distribute crack cocaine. To convict Carter of a conspiracy to distribute crack cocaine, the government had to prove there was an agreement to distribute crack cocaine-an agreement known to Carter in which he intentionally joined. *United States v. Cook*, 356 F.3d 913, 917 (8th Cir. 2004). The government can prove a conspiracy by direct or circumstantial evidence. Id. We review de novo the sufficiency of the evidence to sustain a conviction and will uphold a jury verdict if substantial evidence supports it. *Light*, 406 F.3d at 997. We view the evidence in the light most favorable to the verdict and accept as established all reasonable inferences supporting the verdict. *Id.*

First, Carter points to the testimony of Toney, the Family Mob's primary supplier of cocaine. Toney testified he sold drugs to Carter individually on three or four occasions.

Carter claims Toney's testimony eliminates him as part of a conspiracy because it demonstrates a very limited participation by Carter. This argument, however, is without merit. "Participation by a defendant in a single act may in fact demonstrate membership in a conspiracy if the act itself will justify an inference of knowledge of the broader conspiracy." *United States v. Tran*, 16 F.3d 897, 904 (8th Cir. 1994). Testimony indicated Carter actively participated in the drug activities of the Family Mob, agreed to stake out the gang's territories where it sold crack cocaine, and embraced the use of firearms to protect the group's trafficking turf. This evidence supports the reasonable inferences that the drug purchases from Toney were a part of the Family Mob's drug trafficking activities, Carter knew there was an agreement among the Family Mob's members to sell drugs, and Carter participated knowingly in that agreed activity.

Carter argues his conviction for aiding and abetting the sale of drugs to Ernest Moss, an individual not connected with the Family Mob, indicates he was working alone and not as part of a conspiracy. However, that Carter made deals on his own or associated with individuals other than Family Mob members does not exculpate him from being a co-conspirator with Family Mob members.

Carter also argues certain testimony indicated Toney, Jones, and other Family Mob members believed Carter to be a snitch. According to Carter, this testimony indicates he was not part of the conspiracy. However, the jury chose not to credit this testimony, and we leave credibility questions to the jury. *United States v. Hill*, 249 F.3d 707, 714 (8th Cir. 2001).

Finally, Carter contends the acts of violence described by the government as acts in furtherance of drug trafficking were only acts of violence as a result of personal disputes. He contends most of the acts of violence resulted from the death of Bellamy, the Family Mob member who was killed by a

member of the rival gang the Bogus Boys. However, that the Family Mob retaliated does not indicate the Family Mob members were solely avenging Bellamy's death. As Family Mob member Hicks testified, Bellamy's death required a response because "[m]ore people would have been coming over ... [t]rying to shoot us, take guys' money, our drug clientele." Such testimony indicates retaliation, protection, money, and preservation of the drug customer base were all factors intertwined and linked to the Family Mob's criminal behavior.

We conclude the record as a whole is sufficient to support the jury's finding Carter conspired with the Family Mob to distribute crack cocaine. Accordingly, we affirm Carter's conviction.

III. CONCLUSION

For the foregoing reasons, we vacate Greenlaw's sentence of 442 months' imprisonment and remand Greenlaw's sentence to the district court to impose the statutory mandatory consecutive minimum sentence of 25 years under Count 10, and we affirm the district court's judgment in all other respects.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	Case Number: **03CR107(4) (JNE/SRN)**
MICHAEL GREENLAW	USM Number: **11255-041**
	Social Security Number: **9017**
	Date of Birth: **1977**
	James B. Sheehy
	(Defendant's Attorney)

THE DEFENDANT:

[ ] pleaded guilty to count(s): .

[ ] pleaded nolo contendere to count(s) **which was accepted by the court.**

[x] was found guilty on count(s) **1, 2, 4, 5, 6, 8, 10** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(1);(b)(1)(A);846	Conspiracy to Distribute & Possess with Intent to Distribute in Excess of 50 Grams of Cocaine Base and 5,000 Grams of Cocaine	11-16-04	1
18:924(o)	Conspiracy to Possess and Brandish Firearms During and in Relation to a Drug Trafficking Crime	11-16-04	2
18:924(c)(1)&2	Carrying a Firearm in Relation to a Crime of Violence	9-11-98	4
18:1959(a)(6)	Conspiracy to Assault with a Dangerous Weapon	9-11-98	5
18:1959(a)(3)&2	Assault with a Dangerous Weapon	10-07-98	6
18:1959(a)(3)&2	Assault with a Dangerous Weapon	06-15-99	8
18:924(c)(1)&(2)	Carrying, Brandishing, and Discharging a Firearm in Relation to a Crime of Violence	06-15-99	10

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[x] The defendant has been found not guilty on counts **9**.

[ ] Count(s) (is) (are) dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change

of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

January 19, 2006
Date of Imposition of Judgment

Joan N. Erickson, United States District Judge

January 20, 2006
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **four-hundred-forty-two (442) months. This term consists of 262 months on Count 1; 240 months on each of Counts 2, 6, and 8; and 36 months on Count 5, all to be served concurrently; and sixty (60) months on Count 4, to be served consecutively to the terms imposed on Counts 1, 2, 5, 6, and 8; and one-hundred-twenty (120) months on Count 10, to be served consecutively to the terms imposed on Counts 1, 2, 4, 5, 6, and 8.**

[x] The court makes the following recommendations to the Bureau of Prisons: **Court recommends incarceration in a facility as close to the State of Minnesota as possible.**

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district

[ ]at on.

[ ] as notified by the United States Marshal

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before on.

[ ] as notified by the United States Marshal

[ ] as notified by the Probation or Pretrial Services Office

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

_____

By Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) years. This term consists of 5 years on each of Counts 1, 4, and 10; 3 years on each of Counts 2, 6, and 8; and 1 year on Count 5, all such terms to be run concurrently.**

The defendant must report to the probation office in the district to which the defendant is released with 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[ ] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[x] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation office;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependants and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Special Conditions of Supervision

a) The defendant shall not commit any crimes, federal, state, or local.

b) The defendant shall abide by the standard conditions of supervised release recommended by the Sentencing Commission.

c) The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.

d) The defendant shall participate in a program for drug and alcohol abuse at the direction of the probation officer. That program may include testing and inpatient or outpatient treatment, counseling or a support group. Further, the defendant shall contribute to the costs of such treatment as determined by the Probation Office Co-Payment Program not to exceed the total cost of treatment.

e) The defendant shall undergo mandatory drug testing as set forth by 18 U.S.C. §§ 3563(a) and 3583(d).

f) The defendant shall not associate with any member, prospect, or associate member of the "Family Mob Gang," or any other gang. If the defendant is found to

be in the company of such individuals wearing the clothing, colors, or insignia of the "Family Mob Gang" or any other gang, the Court will presume that this association was for the purpose of participating in gang activities.

g) The defendant shall cooperate in the collection of DNA as approved by the probation officer and mandated pursuant to 18 U.S.C. §§ 3563(a) and 3583(d).

h) The defendant shall participate in educational programming, as approved by the probation officer, to obtain a high school diploma or General Equivalency Diploma.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$700.00	0	

[x] The determination of restitution is left open for ninety (90) days. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. §3664(i), all nonfederal victims must be paid before the United States is paid.

Name and Address of Payee	*Total Loss	Restitution Ordered	Priority or Percentage
Totals:	$0.00	$0.00	0.00%

Payments are to be made to the Clerk, U.S. District Court, for disbursement to the victim

[ ] Restitution amount ordered pursuant to plea agreement $.

[ ] The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] the interest requirement is waived for the [ ] fine [ ] restitution.

[ ] the interest requirement for the: [ ] fine [ ] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [ ] Lump sum payment of $ due immediately, balance due

[ ] not later than, or

[ ] in accordance [ ] C, [ ] D, [ ] E, or [ ] F below; or

B [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, or [ ] F below); or

C [ ] Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g. months or years), to commence (e.g. 30 or 60 days) after the date of this judgment; or

D [ ] Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g. months or years), to commence (e.g. 30 or 60 days) after the release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

[ ] The defendant shall pay the cost of prosecution

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interesting the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including costs of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-1365

United States of America,

Appellee

v.

Michael Greenlaw, also known as Mikey,

Appellant

Appeal from U.S. District Court for the District of Minnesota - St. Paul
(CR 03-107-04 JNE/SRN)

ORDER

Appellant's motion to file his petition for rehearing en banc out of time has been considered by the court and is granted.

April 24, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-1365

United States of America,

Appellee

v.

Michael Greenlaw, also known as Mikey,

Appellant

Appeal from U.S. District Court for the District of Minnesota - St. Paul
(CR 03-107-04 JNE/SRN)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 10, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

REPLY BRIEF

No. 07-330 11-29-07

IN THE

Supreme Court of the United States

Michael J. Greenlaw,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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United States v. Rivera, 411 F.3d 864 (7th Cir.), *cert. denied*, 546 U.S. 966 (2005) 2

Zamora v. Elite Logistics, Inc., 478 F.3d 1160 (10th Cir. 2007) 4

Statutes

18 U.S.C. § 3742(b) 5

REPLY BRIEF FOR THE PETITIONER

Respondent acknowledges that the Eighth Circuit erred in enlarging petitioner's criminal sentence in the absence of a cross-appeal by the Government. Accordingly, the Court should accept the Solicitor General's suggestion that the judgment below cannot stand and should, at a bare minimum, grant, vacate, and remand (GVR) this case for further consideration in light of the Government's concession of error. However, there is no guarantee that the court of appeals would correct its error on remand, and substantial reason to believe that it would not. Moreover, the Solicitor General recognizes that the error below contributed to a growing circuit split over a court of appeals' authority to enlarge a criminal sentence in the absence of a government appeal or cross-appeal. A GVR would do little to resolve that division in the circuits. Accordingly, rather than remand the case for reconsideration, the Court should summarily reverse the decision below, ending the growing circuit split on a question that is not susceptible to reasonable dispute.

I. The Court Should Summarily Reverse The Judgment Below To Correct The Eighth Circuit's Decision And Resolve The Acknowledged Circuit Split.

The Government's prediction that a GVR will prompt the Eighth Circuit to correct itself, and that the acknowledged circuit split will eventually sort itself out without this Court's intervention, is ill-founded.

1. Although the question of the court's authority to increase petitioner's sentence without a cross-

appeal was not briefed before the panel, the decision was plainly considered and is unlikely to change without more substantial direction from this Court. The Eighth Circuit forthrightly acknowledged that it was contributing to a circuit split, following *United States v. Moyer*, 282 F.3d 1311 (10th Cir. 2002), and expressly departing from the Seventh Circuit's decision in *United States v. Rivera*, 411 F.3d 864 (7th Cir.), *cert. denied*, 546 U.S. 966 (2005). The court further quoted the essential contrary holding of the Seventh Circuit's decision, acknowledging that its sister circuit had held that "[b]y deciding not to take a cross-appeal, the United States has ensured that [the defendant's] sentence cannot be increased." Pet. App. 9a-10a n.5 (quoting *Rivera*, 411 F.3d at 867). For that proposition, the Seventh Circuit cited this Court's decision in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), the principal authority upon which the United States relies in concluding that the decision below is wrong, BIO 8-9. Accordingly, although it is technically true that the court of appeals' decision "did not address this Court's decision in *Neztsosie*," BIO 12, it would be misleading to suggest that the court was unaware of that decision, and unrealistic to assume that it will reverse course in light of further briefing on *Neztsosie*'s relevance to this case.

The Solicitor General also suggests that the Eighth Circuit might reverse course on remand in light of this Court's intervening decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007). BIO 12. But then the Government goes on to suggest that the decision in *Bowles* would actually *support* the decision below by indicating that the cross-appeal requirement is non-jurisdictional. BIO 17 (suggesting that *Bowles* held

that limitations not embodied in statutes are non-jurisdictional, and further asserting that "[n]o federal statute specifies the time for filing a notice of cross-appeal"). That reading of *Bowles* – together with settled Eighth Circuit precedent holding that the cross-appeal requirement is not jurisdictional[1] – casts doubt on any hope that a remand in light of *Bowles* would correct the decision below or resolve the circuit split.

2. A GVR is also unlikely to correct erroneous decisions in other circuits. As the Government acknowledges, BIO 14, the Tenth Circuit recently increased a criminal defendant's sentence *sua sponte* without a cross-appeal by the Government. *See United States v. Moyer*, 282 F.3d 1311, 1318 (10th Cir. 2002). Despite the Solicitor General's prediction that it is "likely that the Tenth Circuit . . . will be amenable to reconsidering" *Moyer*, BIO 14, his brief provides little reason to believe that the Tenth

---

[1] As the United States recognizes, the Eighth Circuit's decision in this case is consistent with prior circuit precedent that holds that the cross-appeal requirement is a "rule of practice," not a restriction on the court's jurisdiction. *See* BIO 13-14; *see also Chi., Burlington & Quincy R.R. Co. v. Ready Mixed Concrete Co.*, 487 F.2d 1263, 1268 n.5 (8th Cir. 1973) (modifying the judgment below in favor of appellee though appellee did not file a cross-appeal); *see also Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 476 (8th Cir. 1977) ("[R]ules requiring separate appeals by other parties are rules of practice, which may be waived in the interest of justice where circumstances so require."). The Government attempts to suggest that the Eighth Circuit will reconsider *that* line of precedent, too. BIO 13-14. But at most, the Government's brief illustrates the uncertainty and confusion that reigns in and among circuits about courts' authority to enlarge a judgment in favor of a non-appealing party.

Circuit will do so without this Court's intervention. To the contrary, any reversal of course would require action by the entire membership of the Tenth Circuit sitting en banc. *See Shubargo v. Astrue*, 498 F.3d 1086, 1088 n.1 (10th Cir. 2007) ("We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.").[2] The prospect of future reversal by an en banc court – always a theoretical possibility, but rarely a real solution[3] – should not prevent this Court from intervening now to end a division that has only grown in recent years, not diminished. *See* Pet. 7-11.

3. Reversal of the Eighth Circuit's decision thus is necessary to return uniformity to the law. And because the court of appeals' error is clear, summary proceedings are appropriate in this case. As the Government's brief demonstrates, there is no serious argument to support the view that a court of appeals may enlarge a criminal sentence in the absence of an appeal or cross-appeal by the Government. *See* BIO 8-12. This Court has long adhered to the "inveterate and certain" rule against "modifying judgments in favor of a nonappealing party." *Neztsosie*, 526 U.S. at

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[2] As discussed above, while *Bowles* may be relevant, it is unlikely that a three-judge panel would hold that it is sufficiently "contrary" to justify reversing *Moyer* without en banc review.

[3] The Tenth Circuit has issued only four en banc opinions this calendar year. *See San Juan County, Utah v. United States*, 503 F.3d 1163 (10th Cir. 2007) (en banc); *In re Mersmann*, --- F.3d ---, 2007 WL 2833218 (10th Cir. Sept. 24, 2007) (en banc); *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160 (10th Cir. 2007) (en banc); *Cortez v. McCauley*, 478 F.3d 1108 (10th Cir. 2007) (en banc).

479-80. Whether that limitation is jurisdictional or not, the Court has noted that "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to that rule." *Id.* at 480. As petitioner has argued, Pet. 18-19, and as the Government agrees, BIO 11-12, there is especially good reason to preclude any exception with respect to criminal sentencing appeals – Congress entrusted the Attorney General, the Solicitor General, or a designated deputy solicitor general, with the authority to determine when and whether the Government should appeal lower court judgments. *See* 18 U.S.C. § 3742(b). The decision below inalterably conflicts with that congressionally ordained division of authority.

In the absence of sufficient reason to believe that further percolation will resolve the circuit split, and in light of the overwhelming authority supporting reversal, this Court should forgo any further delay and uncertainty by summarily reversing the Eighth Circuit's judgment.

CONCLUSION

For the foregoing reasons, this Court should summarily reverse the judgment below.

Respectfully submitted,

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November 29, 2007

JOINT APPENDIX

FILED
FEB 14 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

85

(5)

No. 07-330

IN THE

Supreme Court of the United States

MICHAEL J. GREENLAW,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 7, 2007
CERTIORARI GRANTED JANUARY 4, 2008

BEST AVAILABLE COPY

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APPENDIX A

U.S. District Court
U.S. District Court Minnesota (DMN)
CRIMINAL DOCKET FOR CASE #: 0:03-cr-00107-JNE-SRN
All Defendants

Case title: USA v. Carter, et al
Magistrate judge case number: 0:02—mj—00291

Date Filed: 04/01/2003
Date Terminated: 01/20/2006

Assigned to: Judge Joan N. Ericksen
Referred to: Magistrate Judge Susan R. Nelson

Appeals case court number:
05-3391 Eighth Circuit Court of Appeals

Defendant (4)

Michael Greenlaw
TERMINATED: 01/20/2006
also known as
Mikey
TERMINATED: 01/20/2006

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TERMINATED: 08/23/2005
Designation: CJA Appointment

Pending Counts	**Disposition**
21:841(a)(1), 841(b)(1)(A), and 846 CONSPIRACY	Re-sentenced to: 622 months: 262 as to Count 1; 240 months oneach of Counts 2, 6, and 8; 36 months on Count 5, all to

TO DISTRIBUTE AND POSSESS WITH INTENT TO DISTRIBUTE COCAINE BASE (CRACK) (1ssss)	be served concurrently; 60 months on Count 4, to be served consecutively to Counts 1,2,5,6, and 8; and 300 months on Count 10, to be served consecutively to Counts 1,2,4,5,6, and 8. All other terms and conditions remain the same. Supervised Release; 5 years. Special Assessment of $700
18:924(o) CONSPIRACY TO POSSESS FIREARMS DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME (2ssss)	Re-sentenced to: 622 months: 262 as to Count 1; 240 months oneach of Counts 2, 6, and 8; 36 months on Count 5, all to be served concurrently; 60 months on Count 4, to be served consecutively to Counts 1,2,5,6, and 8; and 300 months on Count 10, to be served consecutively to Counts 1,2,4,5,6, and 8. All other terms and conditions remain the same. Supervised Release; 5 years. Special Assessment of $700
18:924(c)(1) and 2 AIDING AND ABETTING CARRYING A FIREARM IN	Re-sentenced to: 622 months: 262 as to Count 1; 240 months oneach of Counts 2, 6, and 8; 36 months on Count 5, all to be served concurrently; 60

RELATION TO A CRIME OF VIOLENCE (4ssss)	months on Count 4, to be served consecutively to Counts 1,2,5,6, and 8; and 300 months on Count 10, to be served consecutively to Counts 1,2,4,5,6, and 8. All other terms and conditions remain the same. Supervised Release; 5 years. Special Assessment of $700
18:1959(a)(6)CONSPIRACY TO ASSAULT WITH A DANGEROUS WEAPON (5ssss)	Re-sentenced to: 622 months: 262 as to Count 1; 240 months oneach of Counts 2, 6, and 8; 36 months on Count 5, all to be served concurrently; 60 months on Count 4, to be served consecutively to Counts 1,2,5,6, and 8; and 300 months on Count 10, to be served consecutively to Counts 1,2,4,5,6, and 8. All other terms and conditions remain the same. Supervised Release; 5 years. Special Assessment of $700
18:1959(a)(3) and 2 AIDING AND ABETTING ASSAULT WITH A DANGEROUS WEAPON (6ssss)	Re-sentenced to: 622 months: 262 as to Count 1; 240 months oneach of Counts 2, 6, and 8; 36 months on Count 5, all to be served concurrently; 60 months on Count 4, to be served consecutively to

	Counts 1,2,5,6, and 8; and 300 months on Count 10, to be served consecutively to Counts 1,2,4,5,6, and 8. All other terms and conditions remain the same. Supervised Release; 5 years. Special Assessment of $700
18:1959(a)(3) and 2 AIDING AND ABETTED ASSAULT WITH A DANGEROUS WEAPON (8ssss)	Re-sentenced to: 622 months: 262 as to Count 1; 240 months oneach of Counts 2, 6, and 8; 36 months on Count 5, all to be served concurrently; 60 months on Count 4, to be served consecutively to Counts 1,2,5,6, and 8; and 300 months on Count 10, to be served consecutively to Counts 1,2,4,5,6, and 8. All other terms and conditions remain the same. Supervised Release; 5 years. Special Assessment of $700
18:924(c)(1) and 2 AIDING AND ABETTED CARRYING A FIREARM IN RELATION TO A CRIME OF VIOLENCE (10ssss)	Re-sentenced to: 622 months: 262 as to Count 1; 240 months oneach of Counts 2, 6, and 8; 36 months on Count 5, all to be served concurrently; 60 months on Count 4, to be served consecutively to Counts 1,2,5,6, and 8; and 300 months on Count 10, to be

	served consecutively to Counts 1,2,4,5,6, and 8. All other terms and conditions remain the same. Supervised Release; 5 years. Special Assessment of $700
Highest Offense Level (Opening) Felony	
Terminated Counts	**Disposition**
21:841(a)(1), 841(b)(1)(A), and 846 CONSPIRACY TO DISTRIBUTE AND POSSESS WITH INTENT TO DISTRIBUTE COCAINE BASE (CRACK) (1ss)	dismissed
21:841(a)(1), 841(b)(1)(A), and 846 CONSPIRACY TO DISTRIBUTE AND POSSESS WITH INTENT TO DISTRIBUTE COCAINE BASE	dismissed

(CRACK) (1sss)	
18:924(O) CONSPIRACY TO POSSESS FIREARMS DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME (2ss)	dismissed
18:924(o) CONSPIRACY TO POSSESS FIREARMS DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME (2sss)	dismissed
18:924(c)(1) and 2 AIDING AND ABETTING CARRING A FIREARM IN RELATION TO A CRIME OF VIOLENCE (4sss)	dismissed

18:1956(a)(6) CONSPIRACY TO ASSAULT WITH A DANGEROUS WEAPON (5sss)	dismissed
18:1959(a)(3) AND 2 AIDING AND ABETTING ASSAULT WITH A DANGEROUS WEAPON (6sss)	dismissed
18:924(c)(1) and 2 AIDING AND ABETTING CARRYING A FIREARM IN RELATION TO A CRIME OF VIOLENCE (7)	dismissed
18:924(c)(1) CARRYING A FIREARM IN RELATION TO A CRIME OF VIOLENCE (7s)	dismissed

18:924(c)(1) CARRYING A FIREARM IN RELATION TO A CRIME OF VIOLENCE (7ss)	dismissed
18:1959(a)(1) CONSPIRACY TO ASSAULT WITH A DANGEROUS WEAPON (8)	dismissed
18:1959(a)(6) CONSPIRACY TO ASSAULT WITH A DANGEROUS WEAPON (8s)	dismissed
18:1959(a)(6) CONSPIRACY TO ASSAULT WITH A DANGEROUS WEAPON (8ss)	dismissed
18:1959(a)(3)	dismissed

AND 2 AIDING AND ABETTING ASSAULT WITH A DANGEROUS WEAPON (8sss)	
18:1959(a)(3) and 2 AIDING AND ABETTING ASSAULT WITH A DANGEROUS WEAPON (9s)	dismissed
18:1959(a)(3) and 2 AIDING AND ABETTING ASSAULT WITH A DANGEROUS WEAPON (9ss)	dismissed
18:924(c)(1) AND 2 AIDING AND ABETTING CARRYING A FIREARM IN RELATION TO A DRUG TRAFFICKING CRIME (9sss)	dismissed

18:1924(c)(1) and 2 AIDING AND ABETTED CARRYING A FIREARM IN RELATION TO A DRUG TRAFFICKING CRIME (9ssss)	Not Guilty Verdict
18:924(c)(1) AND 2 AIDING AND ABETTING CARRYING A FIREARM IN RELATION TO A CRIME OF VIOLENCE (10sss)	dismissed
18:1959(a)(3) and 2 AIDING AND ABETTING ASSAULT WITH A DANGEROUS WEAPON (13ss)	dismissed
18:924(c)(1) and 2 AIDING AND ABETTING CARRYING A FIREARM IN	dismissed

RELATION TO A
CRIME OF
VIOLENCE
(14ss-15ss)

Highest Offense Level (Terminated)
Felony

Complaints
None

Disposition

Material Witness
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Date Filed	#	Docket Text
09/17/2002	1	COMPLAINT by USA David P Steinkamp with attached affidavit of David Sebesta (DEATF) against defendant Laquan Carter by Magistrate Judge J. Earl Cudd. 4pgs [0:02-m -291] (LEG) (Entered: 09/18/2002)
11/16/2004	247	SIXTH SUPERSEDING INDICTMENT assigned to Judge Joan N Ericksen referred to Chief Magistrate Jonathan G Lebedoff by USA David P Steinkamp as to Laquan Dwayne Carter (1) counts 1ssssss, 2ssssss, 3ssssss, 7ssssss, and Michael Greenlaw (4) counts 1ssss, 2ssss, 4ssss, 5ssss, 6ssss, 8ssss, 9ssss, 10ssss. (MKF) (Entered: 11/17/2004)
12/23/2004	314	JURY VERDICT as to Michael Greenlaw (4) Guilty on Counts 1ssss,2ssss,

		4ssss,5ssss,6ssss,8ssss,10ssss and Not Guilty on Count 9ssss. (PJS) Modified on 2/7/2005 (Gilgenbach, Leah). (Entered: 12/28/2004)
12/16/2005	375	POSITION ON SENTENCING/SENTENCING MEMORANDUM *Position of Defendant With Respect to Sentencing Factors* by Michael Greenlaw (Sheehy, James) (Entered: 12/16/2005)
01/17/2006	379	RESPONSE by United States of America re 375 Position on Sentencing/Sentencing Memorandum (Attachments: # 1 Certificate of Service)(Steinkamp, David) (Entered: 01/17/2006)
01/20/2006	381	SENTENCING JUDGMENT as to Michael Greenlaw (4) Signed by Judge Joan N Ericksen on 1/20/06. Custody of BOP for 442 months. This term consists of 262 months on Count 1; 240 months on each of Counts 2, 6, and 8; and 36 months on Count 5, all to be served concurrently; and 60 months on Count 4, to be served consecutively to the terms imposed on Counts 1, 2, 5, 6, and 8; and 120 months on Count 10,

		to be served consecutively to the terms imposed on Counts 1, 2, 4, 5, 6, and 8. Supervised Release of 5 years. This term consists of 5 years on each of Counts 1, 4, and 10; 3 years on each of Counts 2, 6, and 8; and 1 year on Count 5, all such terms to be run concurrently. Special Assessment of $700.00; Restitution is left open for 90 days. There was a Not Guilty Verdict on Count 9ssss, filed on 12/23/04 . (LEG) (Entered: 01/20/2006)
01/26/2006	383	NOTICE OF APPEAL by Michael Greenlaw (Benson, Kassius) (Entered: 01/26/2006)
02/17/2006	387	TRANSCRIPT of Sentencing as to Michael Greenlaw held on 1/19/06 before Judge Joan N. Ericksen. Court Reporter: Maria Weinbeck. (25pgs) FILED CONVENTIONALLY (JME) (Entered: 02/17/2006)
03/23/2007	395	Opinion of USCA (electronic copy) as to Michael Greenlaw re 383 Notice of Appeal - Final Judgment. (MKF) (Entered: 03/23/2007)
03/23/2007	396	JUDGMENT of USCA (electronic copy) as to Michael Greenlaw re 383 Notice of Appeal - Final

		Judgment. (MKF) (Entered: 03/23/2007)
04/18/2007	397	MANDATE of USCA (electronic copy) as to Laquan Dwayne Carter re 332 Notice of Appeal - Final Judgment. (LEG) (Entered: 04/20/2007)
04/24/2007	398	ORDER of USCA (Electronic Copy) as to Michael Greenlaw (3). Appellant's motion to file his petition for hearing en banc out of time has been considered by the court and is granted. (LEG) (Entered: 04/25/2007)
05/10/2007	399	ORDER of USCA (electronic copy) The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied as to Michael Greenlaw. (MKF) (Entered: 05/15/2007)
05/30/2007	400	MANDATE of USCA (electronic copy) as to Michael Greenlaw re 383 Notice of Appeal - Final Judgment. (LEG) Modified text on 6/4/2007 (leg) (Entered: 06/04/2007)
06/22/2007	401	RE-SENTENCING NOTICE as to Michael Greenlaw. Re-Sentencing set for 8/28/2007 10:30 AM in Minneapolis - Courtroom 12W before Judge

		Joan N. Ericksen. Counsel are directed to check the kiosk on the 1st Floor of the Federal Building for any change in location.(slf) (Entered: 06/22/2007)
08/28/2007	403	Minute Entry for proceedings held before Judge Joan N. Ericksen :Re-Sentencing held on 8/28/2007 for Michael Greenlaw. (Court Reporter Maria Weinbeck) (slf) (Entered: 08/28/2007)
08/28/2007	404	RESENTENCING JUDGMENT IN A CRIMINAL CASE PURSUANT TO REMAND as to Michael Greenlaw (4). Re-sentencing as to counts 1ssss, 2ssss, 4ssss, 5ssss, 6ssss, 8ssss and 10ssss. Re-sentenced to: 622 months: 262 as to Count 1ssss; 240 months on each of Counts 2ssss, 6ssss, and 8ssss; 36 months on Count 5ssss, all to be served concurrently; 60 months on Count 4ssss, to be served consecutively to Counts 1ssss, 2ssss, 5ssss, 6ssss, and 8ssss; and 300 months on Count 10ssss, to be served consecutively to Counts 1ssss, 2ssss, 4ssss, 5ssss, 6ssss, and 8ssss. All other terms and conditions remain the same. Supervised Release; 5 years. Special Assessment of $700; Not Guilty Verdict as to count 9ssss.

		Signed by Judge Joan N. Ericksen on 8/28/07. (LEG) (Entered: 08/28/2007)
09/11/2007	405	TRANSCRIPT of Resentencing Hearing as to Michael Greenlaw held on 7/28/07 before Judge Joan Ericksen. Court Reporter: Maria Weinbeck. (6pgs) FILED CONVENTIONALLY (KNK) (Entered: 09/11/2007)

APPENDIX B

General Docket
Eighth Circuit Court of Appeals

Court of Appeals Docket #: 06-1365 **Docketed**: 01/30/2006
United States v. Michael Greenlaw **Termed**: 03/23/2007
Appeal From: U.S. District Court for the
District of Minnesota - St. Paul

Case Type Information:
1) Criminal
2) conviction & sentence
3) null

Originating Court Information:
District: 0864-3 : CR 03-107-04 JNE/SRN
Court Reporter: Maria Victoria Weinbeck,
Court Reporter
Trial Judge: Joan N. Ericksen, U.S. District Judge
Date Filed: 04/01/2003
Date Order/Judgment: 01/20/2006 **Date NOA Filed**: 01/26/2006

Prior Cases:
04-4058
Date Filed: 12/14/2004 **Date Disposed**: 12/23/2004
Disposition: Denied

Current Cases:
None

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v.

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Defendant - Appellant

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UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MICHAEL GREENLAW, also known as Mikey

Defendant - Appellant

01/30/2006	Criminal Case Docketed Dist. Ct. Office: St. Paul, MN
01/30/2006	CERTIFIED copies notice of appeal, judgment, docket entries. [06-1365] [2003223]
01/30/2006	REMARKS: 18:841,846,924,1959. Conspiracy to distribute and possess with intent to distribute in excess of 50 grams of cocaine base and 5,000 grams of cocaine, conspiracy to possess and brandish firearms, carrying a firearm in relation to a crime of violence, conspiracy to and assault with a dangerous weapon, discharging a firearm in relation to a crime of violence. Trial: 13 days. Verdict: guilty. Sentence: 442 mos. Appealing sentence and conviction. INCARCERATED. [06-1365]
01/30/2006	RECORDS received: Transcript, consisting of 2 Vols. (Arraignment/Pretrial #164; Motions Hrg. #246). Location St. Paul. [06-1365]
01/30/2006	BRIEFING SCHEDULE: [06-1365, 05-3391] Transcript due on 3/13/06 in 06-1365, Clerk's Record due on 3/15/06 in 06-1365, in 05-3391 PSI report due on 3/15/06 in Aplnt brief due on 3/29/06 in 06-1365, in 05-3391 Aplee brief due on 4/19/06 in 06-1365, in 05-3391
01/31/2006	CERTIFIED copies of docket entries received from MNST w/attached copy of receipt #34641000141 in the amount of $255 for payment of filing/docketing fee. [06-1365] [2003843]
01/31/2006	UPDATE fee status change to paid, regarding counsel information changed on docket. [06-

	1365]
01/31/2006	Clerk letter sent advising case that has been updated to reflect fee is paid on appeal and counsel is retained; the previously issued briefing schedule remains effective. [06-1365, 05-3391]
02/01/2006	APPEARANCE for appellee, attorney David Philip Steinkamp [06-1365] [2004234]
02/01/2006	RECORDS received: PSI report. sealed copies: 3 Location: STP. [06-1365]
02/03/2006	APPEARANCE for appellant, attorney Kassius O. Benson [06-1365] [2005702]
02/06/2006	APPEARANCE for appellant, attorney Kassius O. Benson [06-1365] [2006475]
02/15/2006	RECORDS received: Clerk's Record, consisting of 1 Volumes, copies 3. Location: STP [06-1365]
02/21/2006	RECORDS received: Transcript, consisting of 1 Vol. Sentencing TR #387. Location St. Paul. [06-1365]
03/02/2006	MOTION of aplnt, Michael Greenlaw in 06-1365 , for leave to late file certificate regarding trenscripts. [06-1365] [2016202] w/service 2/24/06
03/02/2006	ORDER filed:granting appellant motion for leave to late file certificate regarding transcripts [2016202-1] [06-1365] [2016204]

03/20/2006	RECORDS received: Transcript, consisting of 1 pretrial motions hrg. Volume(s). Location STP. [06-1365]
03/30/2006	ORDER filed:granting in part appellant's motion for extension of time to file brief [2027309] in 05-3391 Aplnt brief now due on 4/12/06 in 05-3391, in 06-1365
03/31/2006	BRIEF FILED - Brief of Appellant- Michael Greenlaw in 06-1365 28 pages 11 copies - w/service 3/29/06 w/diskette . Defects: no addendum [06-1365] [2027832]
03/31/2006	RECORDS received: Appendix filed by Appellant Michael Greenlaw in 06-1365 consisting of 1 Volume(s), 4 Copies. Defects: no TOC, not page numbers, no lower court docket sheets [06-1365]
04/12/2006	ADDENDUM FILED - Appellant addendum. 10 copies w/service 4/10/06 [06-1365] [2034002]
04/12/2006	RECORDS received: corrected Appendix, consisting of 1 Volume 3 copies. [06-1365]
04/25/2006	TO SCREENING - to mg. [05-3391, 06-1365]
04/26/2006	Record correction received for appendix . Correction: criminal docket entries [06-1365]
05/01/2006	RETURNED from Screening (15) [05-3391, 06-1365]
05/03/2006	MOTION of aplee, USA in 05-3391, 06-1365 , for extension of time to file brief until 5/26/06 . [05-3391, 06-1365] [2040752] w/service 5/3/06
05/03/2006	ORDER filed:granting appellee's motion

	extension of time to file brief [2040752-1] [2040753] in 05-3391, 06-1365 Aplee brief now due on 5/26/06 in 05-3391, in 06-1365.
05/12/2006	*SET FOR ARGUMENT* - June 2006 in St. Louis, Missouri.
05/16/2006	RECORDS received: from St. Paul. Records Included: 21 vols. TR. [05-3391, 06-1365]
05/30/2006	MOTION of aplnt, Michael Greenlaw in 06-1365, for Continuance of oral argument. [2049753] TO COURT w/service 5/30/06
05/30/2006	BRIEF FILED - Brief of Appellee - USA in 05-3391, 06-1365 . 786 lines - 10 copies - w/service 5/26/06 . w/diskette [05-3391, 06-1365] [2050866]
06/01/2006	JUDGE ORDER: granting appellant, Michael Greenlaw's motion in Case No. 06-1365 for continuance of oral argument. In addition Case No. 05-3391 (USA v. Dwayne Carter, etc.) will be continued to a later date. Both cases will be rescheduled for oral argument together at a later date. [2049753-1] [06-1365, 05-3391] [2051095] in 06-1365
06/01/2006	CASE REMOVED FROM CALENDAR. [06-1365, 05-3391]
08/24/2006	*SET FOR ARGUMENT* - September, 2006 in St. Louis.
09/26/2006	ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Diana E. Murphy, Circuit Judge, David R. Hansen, Senior Judge, William J. Riley, Circuit Judge . Daniel L. Gerdts for Appellant LaQuan Dwayne Carter, Appellant

	LaQuan Dwayne Carter in 05-3391, David Philip Steinkamp for Appellee USA in 05-3391, Kassius O. Benson for Appellant Michael Greenlaw, Appellant Michael Greenlaw in 06-1365, David Philip Steinkamp for Appellee USA in 06-1365. RECORDED. [05-3391, 06-1365]
03/23/2007	OPINION FILED - THE COURT: DIANA E. MURPHY ; DAVID R. HANSEN ; WILLIAM JAY RILEY. William Jay Riley, Authoring Judge (PUBLISHED) [3291328] [05-3391, 06-1365]
03/23/2007	JUDGMENT FILED - The judgment of the originating court is AFFIRMED, VACATED AND REMANDED in accordance with the opinion. DIANA E. MURPHY ; DAVID R. HANSEN ; WILLIAM JAY RILEY [3291350] [06-1365]
04/12/2007	MOTION of Appellant Mr. Michael Greenlaw file untimely petition for rehearing w/service 04/12/2007. [3298587] [06-1365]
04/24/2007	JUDGE ORDER:Granting [3298587-2] motion file untimely rehearing filed by Appellant Mr. Michael Greenlaw. (Hrg Sep 2006) [3302292] [06-1365]
04/24/2007	PETITION for enbanc rehearing filed by Appellant Mr. Michael Greenlaw. w/service 04/05/2007 [3302313] [06-1365]
05/10/2007	JUDGE ORDER:denying [3302313-2] petition for enbanc rehearing filed by Appellant Mr. Michael Greenlaw. Petition for panel rehearing is also denied. (Hrg Sep 2006); DENIED. Published Order. [3308438] [06-1365]

05/30/2007	MANDATE ISSUED. [06-1365]
07/31/2007	DOCUMENT FILED - Letter from Supreme Court of the United States advising that extension of time to file petition for a writ of cetiorari is granted until 09/07/2007. [3335759] [06-1365]
09/17/2007	U.S. Supreme Court Notice of cert filed. Supreme Court Case Number: 07-330, Filed Date: 09/07/2007 [3352984] [06-1365]
01/10/2008	SUPREME COURT order filed granting cert petition. Order filed on 01/04/2008. [3393226] [06-1365]
02/04/2008	Supreme Court letter/notice filed: requesting 8th Cir. record [06-1365]
02/08/2008	8th Circuit record sent to Supreme Court - consisting of complete pleadings file & pre-sentence report (sealed). By copy of the correspondence sent to the Supreme Court, the District Court is requested to transmit their records directly to the Supreme Court. [06-1365]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 03-107 (JNE/JGL)

UNITED STATES OF AMERICA,	)	SIXTH SUPERSEDING INDICTMENT
Plaintiff,	)	(18 U.S.C. § 2)
	)	(18 U.S.C. § 924(c))
v.	)	(18 U.S.C. § 924(o))
	)	(18 U.S.C. § 1959)
1. LAQUAN DWAYNE CARTER, a/k/a Quan a/k/a Q-Ball, and	)	(21 U.S.C. § 841(a)(1))
	)	(21 U.S.C. § 841(b)(1)(A))
	)	(21 U.S.C. § 841(b)(1)(B))
	)	(21 U.S.C. § 846)
4. MICHAEL GREENLAW, a/k/a Mikey,	)	(Minn. Stat. § 609.185)
	)	(Minn. Stat. § 609.222)
	)	(Minn. Stat. § 609.713)
Defendants.	)	

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT 1
(Conspiracy to Distribute and Possess with Intent to Distribute)

From a date unknown, but from at least 1996 through the date of this Indictment, in the State and District of Minnesota, the defendants,

LAQUAN DWAYNE CARTER,
a/k/a Quan,
a/k/a Q-ball, and
MICHAEL GREENLAW,
a/k/a Mikey,

knowingly and intentionally conspired with each other and with other persons, whose names are known and unknown to the grand jury, including, but not limited to, Isaac Hodge, a/k/a Ike, Norman Darnell Toney, a/k/a Colo, Michael Engel, Darryl Davis, a/k/a Durl, Darryl Bellamy, Antonio Ray Nelson, a/k/a Heman, and Everette NMN Jones, Jr., a/k/a Everett NMN Jones, a/k/a Toot, a/k/a Too, to possess with intent to distribute and distribute in excess of fifty grams of cocaine base (crack) and in excess of five thousand grams of cocaine, controlled substances, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A), and 846.

COUNT 2

(Conspiracy to Possess Firearms During and in Relation to a Drug Trafficking Crime)

From a date unknown, but from at least 1996 through the date of this Indictment, in the State and District of Minnesota, the defendants,

LAQUAN DWAYNE CARTER,
a/k/a Quan,
a/k/a Q-ball, and
MICHAEL GREENLAW,
a/k/a Mikey,

knowingly and intentionally conspired with each other and other persons, whose names are known and unknown to the grand jury, to possess in furtherance of, carry and use a firearm during and in relation to a drug trafficking crime which may be prosecuted in a court of the United States; namely, Conspiracy to Possess with Intent to Distribute and Distribute Controlled Substances, all in violation of Title 18, United States Code, Sections 924(o).

COUNT 3

(Aiding and Abetting Distribution)

On or about April 22, 2002, in the State and District of Minnesota, the defendant,

LAQUAN DWAYNE CARTER,
a/k/a Quan,
a/k/a Q-Ball,

aiding and abetting and being aided and abetted by others, knowingly and intentionally distributed in excess of five grams of a mixture or substance containing a detectable amount of cocaine base (crack), a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B), and Title 18, United States Code, Section 2.

COUNT 4

(Carrying a Firearm in Relation to a Crime of Violence)

On or about September 11, 1998, in the State and District of Minnesota, the defendant,

MICHAEL GREENLAW,
a/k/a Mikey,

aiding and abetting and being aided and abetted by Everette NMN Jones, Jr., a/k/a Everette NMN Jones, a/k/a Toot, a/k/a Too, and others known and unknown to the grand jury, knowingly used and carried a firearm during and in relation to a crime of violence which may be prosecuted in a court of the United States; namely, Conspiracy to Commit Violent Crime in Aid of Racketeering, in violation of Title 18, United States Code, Sections 924(c)(1) and 2.

COUNT 5

(Conspiracy to Assault With a Dangerous Weapon)

1. At all times relevant to this Indictment, the Family Mob Gang constituted an enterprise as defined in Title 18, United States Code, Section 1959(b)(2), that is, a group of individuals associated in fact which was engaged in, and the activities of which affected, interstate and foreign commerce. The enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise. A primary purpose of the enterprise was to earn money for its members and associates through the sale of controlled substances, primarily cocaine and cocaine base ("crack"). Another purpose of the enterprise was the commission of violent acts against perceived enemies of the enterprise.

2. The Family Mob Gang, through its members and associates, engaged in racketeering activity as defined in Title 18, United States Code, Sections 1959(b)(1) and 1961(1), namely, narcotics trafficking in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

3. On or about September 11, 1998, in the State and District of Minnesota, the defendant,

MICHAEL GREENLAW,
a/k/a/ Mikey,

for the purpose of gaining entrance to, and maintaining and increasing his position in the Family Mob Gang, an enterprise engaged in racketeering activity, unlawfully, willfully, and knowingly, attempted to and conspired with Everette NMN Jones, Jr., a/k/a Everette NMN Jones, a/k/a Toot, a/k/a Too, and others known and unknown to the grand jury, to assault another with a dangerous weapon; to wit: shooting a firearm at another person on or about September 11, 1998, in violation of Minnesota Statute § 609.222, all in violation of Title 18, United States Code, Section 1959(a)(6).

COUNT 6
(Assault With a Dangerous Weapon)

1. At all times relevant to this Indictment, the Family Mob Gang constituted an enterprise as defined in Title 18, United States Code, Section 1959(b)(2), that is, a group of individuals associated in fact which was engaged in, and the activities of which affected, interstate and foreign commerce. The

enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise. A primary purpose of the enterprise was to earn money for its members and associates through the sale of controlled substances, primarily cocaine and cocaine base ("crack"). Another purpose of the enterprise was the commission of violent acts against perceived enemies of the enterprise.

2. The Family Mob Gang, through its members and associates, engaged in racketeering activity as defined in Title 18, United States Code, Sections 1959(b)(l) and 1961(1); namely, narcotics trafficking in violation of Title 21, United States Code, Sections 841 (a) (1) and 846.

3. On or about October 7, 1998, in the State and District of Minnesota, the defendant,

MICHAEL GREENLAW,
a/k/a Mikey,

aiding and abetted by Everette NMN Jones, Jr., a/k/a Everette NMN Jones, a/k/a Toot, a/k/a Too, and others known and unknown to the grand jury, for the purpose of gaining entrance to, and maintaining and increasing his position in the Family Mob Gang, an enterprise engaged in racketeering activity, unlawfully, willfully, and knowingly, assaulted another with a dangerous weapon; to wit: by detonating an explosive at a residence located at 17 - 27th Street East, Minneapolis, Minnesota, in violation of Minnesota Statute § 609.222, all in violation of Title 18, United States Code, Sections 1959(a)(3) and 2.

5

COUNT 7

(Threat to Commit a Crime of Violence)

1. At all times relevant to this Indictment, the Family Mob Gang constituted an enterprise as defined in Title 18, United States Code, Section 1959(b)(2), that is, a group of individuals associated in fact which was engaged in, and the activities of which affected, interstate and foreign commerce. The enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise. A primary purpose of the enterprise was to earn money for its members and associates through the sale of controlled substances, primarily cocaine and cocaine base ("crack"). Another purpose of the enterprise was the commission of violent acts against perceived enemies of the enterprise.

2. The Family Mob Gang, through its members and associates, engaged in racketeering activity as defined in Title 18, United States Code, Sections 1959(b)(1) and 1961(1); namely, narcotics trafficking in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

3. On or about April 17, 2001, in the State and District of Minnesota, the defendant,

LAQUAN DWAYNE CARTER,
a/k/a Quan,
a/k/a Q-ball,

for the purpose of gaining entrance to, and maintaining and increasing his position in the

Family Mob Gang, an enterprise engaged in racketeering activity, unlawfully, willfully, and knowingly, threatened to commit a crime of violence against any individual; to wit: by threatening to kill another person in violation of Minnesota Statutes §§ 609.185 and 609.713, all in violation of Title 18, United States Code, Section 1959(a)(4).

COUNT 8

(Assault With a Dangerous Weapon)

1. At all times relevant to this Indictment, the Family Mob Gang constituted an enterprise as defined in Title 18, United States Code, Section 1959(b)(2), that is, a group of individuals associated in fact which was engaged in, and the activities of which affected, interstate and foreign commerce. The enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise. A primary purpose of the enterprise was to earn money for its members and associates through the sale of controlled substances, primarily cocaine and cocaine base ("crack"). Another purpose of the enterprise was the commission of violent acts against perceived enemies of the enterprise.

2. The Family Mob Gang, through its members and associates, engaged in racketeering activity as defined in Title 18, United States Code, Sections 1959(b)(l) and 1961(1); namely, narcotics trafficking in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

3. On or about June 15, 1999, in the State and District of Minnesota, the defendant,

MICHAEL GREENLAW,
a/k/a Mikey,

aiding and abetted by Mark Greenlaw, and others known and unknown to the grand jury, for the purpose of gaining entrance to, and maintaining and increasing his position in the Family Mob Gang, an enterprise engaged in racketeering activity, unlawfully, willfully, and knowingly, assaulted another with a dangerous weapon; to wit: by shooting another with a firearm, in violation of Minnesota Statute § 609.222, all in violation of Title 18, United States Code, Sections 1959(a)(3) and 2.

COUNT 9
(Carrying a Firearm in Relation to a Drug Trafficking Crime)

On or about June 15, 1999, in the State and District of Minnesota, the defendant,

MICHAEL GREENLAW,
a/k/a Mikey,

aiding and abetted by Mark Greenlaw and others known and unknown to the grand jury, knowingly possessed in furtherance of and used and carried a firearm during

and in relation to a drug trafficking crime which may be prosecuted in a court of the United States; namely, Conspiracy to Distribute and Possess With Intent to Distribute Controlled Substances, in violation of Title 21, United States Code, Section 846, all in violation of Title 18, United States Code, Sections 924(c)(1) and 2.

COUNT 10

(Carrying a Firearm in Relation to a Crime of Violence)

On or about June 15, 1999, in the State and District of Minnesota, the defendant,

MICHAEL GREENLAW,
a/k/a Mikey,

aiding and abetted by Mark Greenlaw and others known and unknown to the grand jury, knowingly possessed in furtherance of and used and carried a firearm during and in relation to a drug trafficking crime which may be prosecuted in a court of the United States; namely, Violent Crime in Aid of Racketeering, violation of Title 18, United States Code, Sections 924(c)(1) and 2.

SENTENCING ALLEGATIONS

THE GRAND JURY FURTHER CHARGES THAT:

1. In committing the offenses charged in Count 1 of this Indictment, defendants Michael Jason Greenlaw and Laquan Dwayne Carter:

(a) Conspired to possess with intent to distribute and distribute in excess of 1.5 kilograms of cocaine base (crack) as described in U.S.S.G. 2Dl.l(c);

(b) Conspired to possess with intent to distribute and distribute more than 5 kilograms but less than 15 kilograms of cocaine;

(c) Committed an offense in which a dangerous weapon (including a firearm) was possessed, as described in U.S.S.G. § 2D1.1(b)(1).

(d) Reasonably foresaw the possession of a firearm by another coconspirator in connection with the offense, as described in U.S.S.G. §§ 1B1.3 and 2D1.1(b)(1).

(e) committed the instant offenses while under a criminal justice sentence, that is, supervised release and probation, as defined by U.S.S.G. § 4A1.1(d).

A TRUE BILL

UNITED STATES ATTORNEY

FOREPERSON

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 03-107 (JNE/JGL)

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**SPECIAL VERDICT FORM**
v.	)	
(1) LAQUAN DWAYNE CARTER and (4) MICHAEL JASON GREENLAW	)	
Defendants.	)	

COUNT 1
(Conspiracy to Distribute and Possess with Intent to Distribute)

We, the Jury, find the defendant, LaQuan Dwayne Carter GUILTY of the crime
Not Guilty/Guilty
charged in Count 1 of the Sixth Superseding Indictment.

If you find defendant Carter guilty of Count 1, please answer the following questions:

1. What amount of cocaine base (crack), if any, did the members of the conspiracy conspire to distribute or possess with intent to distribute? (Please circle answer).
   a. At least 1.5 kilograms of mixture or substance containing a detectable amount of cocaine base (crack).
   b. At least 500 grams but less than 1.5 kilograms of mixture or substance containing a detectable amount of cocaine base (crack).
   c. At least 150 grams but less than 500 grams of mixture or substance containing a detectable amount of cocaine base (crack).

2. What amount of cocaine, if any, did the members of the conspiracy conspire to distribute or possess with intent to distribute?
   a. At least 5 kilograms but less than 15 kilograms of cocaine.
   b. At least 3.5 kilograms but less than 5 kilograms of cocaine.

We, the Jury, find the defendant Michael Jason Greenlaw GUILTY of the crime charged in
Not Guilty/Guilty
Count 1 of the Sixth Superseding Indictment.

If you find defendant Greenlaw guilty of Count 1, please answer the following questions:

1. What amount of cocaine base (crack), if any, did the members of the conspiracy conspire to distribute or possess with intent to distribute? (Please circle answer).

[a.] At least 1.5 kilograms of mixture or substance containing a detectable amount of cocaine base (crack).

b. At least 500 grams but less than 1.5 kilograms of mixture or substance containing a detectable amount of cocaine base (crack).

c. At least 150 grams but less than 500 grams of mixture or substance containing a detectable amount of cocaine base (crack).

2. What amount of cocaine, if any, did the members of the conspiracy conspire to distribute or possess with intent to distribute? (Please circle answer).

[a.] At least 5 kilograms but less than 15 kilograms of cocaine.

b. At least 3.5 kilograms but less than 5 kilograms of cocaine.

COUNT 2

(Conspiracy to Possess Firearms During and in Relation to a Drug Trafficking Crime)

We, the Jury, find the defendant LaQuan Dwayne Carter GUILTY of the crime

Not Guilty/[Guilty]

charged in Count 2 of the Sixth Superseding Indictment.

If you find defendant Carter guilty of Count 2, please circle any of the following statements that you find to be true:

[a.] A member of the conspiracy *possessed* a firearm in furtherance of a drug trafficking crime.

[b.] A member of the conspiracy *brandished* a firearm during and in relation to a drug trafficking crime.

c. A member of the conspiracy *discharged* a firearm during and in relation to a drug trafficking crime.

We, the Jury, find the defendant Michael Jason Greenlaw GUILTY of the crime charged
Not Guilty/[Guilty]
in Count 2 of the Sixth Superseding Indictment.

If you find defendant Greenlaw guilty of Count 2, please circle any of the following statements that you find to be true:

[a.] A member of the conspiracy *possessed* a firearm in furtherance of a drug trafficking crime.

[b.] A member of the conspiracy *brandished* a firearm during and in relation to a drug trafficking crime.

c. A member of the conspiracy *discharged* a firearm during and in relation to a drug trafficking crime.

COUNT 3
(Aiding and Abetting Distribution)

We, the Jury, find the defendant LaQuan Dwayne Carter GUILTY of the crime
Not Guilty/[Guilty]
charged in Count 3 of the Sixth Superseding Indictment.

If you find defendant Carter guilty of Count 3, please answer the following question:

1. What amount of cocaine base (crack), if any, did the defendant, aided and abetted by others, distribute? (Please circle answer).
   a. Less than 5 grams of cocaine base (crack).
   b. At least 5 grams but less than 20 grams of cocaine base (crack).

COUNT 4
(Carrying a Firearm in Relation to a Crime of Violence)

We, the Jury, find the defendant Michael Jason Greenlaw GUILTY of the crime charged
Not Guilty/Guilty
in Count 4 of the Sixth Superseding Indictment.

If you find defendant Greenlaw guilty of Count 4, please circle any of the following statements that you find to be true:

a. The defendant *possessed* a firearm in furtherance of a crime of violence.
b. The defendant *brandished* a firearm during and in relation to a crime of violence.
c. The defendant *discharged* a firearm during and in relation to a crime of violence.

COUNT 5

(Conspiracy to Assault with a Dangerous Weapon)

We, the Jury, find the defendant Michael Jason Greenlaw GUILTY of the crime charged

Not Guilty/Guilty

in Count 5 of the Sixth Superseding Indictment.

COUNT 6

(Assault with a Dangerous Weapon)

We, the Jury, find the defendant Michael Jason Greenlaw GUILTY of the crime charged

Not Guilty/Guilty

in Count 6 of the Sixth Superseding Indictment.

COUNT 7

(Threat to Commit a Crime of Violence)

We, the Jury, find the defendant LaQuan Dwayne Carter GUILTY of the crime

Not Guilty/Guilty

charged in Count 7 of the Sixth Superseding Indictment.

COUNT 8

(Assault with a Dangerous Weapon)

We, the Jury, find the defendant Michael Jason Greenlaw GUILTY of the crime charged

Not Guilty/Guilty

in Count 8 of the Sixth Superseding Indictment.

COUNT 9
(Carrying a Firearm in Relation to a Drug Trafficking Crime)

We, the Jury, find the defendant Michael Jason Greenlaw NOT GUILTY of the crime charged
Not Guilty/Guilty
in Count 9 of the Sixth Superseding Indictment.

If you find defendant Greenlaw guilty of Count 9, please circle any of the following statements that you find to be true:

a. The defendant *possessed* a firearm in furtherance of a drug trafficking crime.
b. The defendant *brandished* a firearm during and in relation to a drug trafficking crime.
c. The defendant *discharged* a firearm during and in relation to a drug trafficking crime.

COUNT 10
(Carrying a Firearm in Relation to a Crime of Violence)

We, the Jury, find the defendant Michael Jason Greenlaw GUILTY of the crime charged
Not Guilty/Guilty
in Count 10 of the Sixth Superseding Indictment.

If you find defendant Greenlaw guilty of Count 10, please circle any of the following statements that you find to be true:

☒ a. The defendant *possessed* a firearm in furtherance of a crime of violence.

☒ b. The defendant *brandished* a firearm during and in relation to a crime of violence.

☒ c. The defendant *discharged* a firearm during and in relation to a crime of violence.

Dated: 12-23-04

/s/ David D. Kramer
Foreperson
David D. Kramer

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
CRIMINAL DIVISION
Criminal No. 03-107 (JNE/JGL)

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	GOVERNMENT'S
	)	RESPONSE TO
v.	)	DEFENDANT'S
	)	POSITION REGARDING
MICHAEL JASON GREENLAW,	)	SENTENCING
Defendant.	)	

The United States of America, through its attorneys, Thomas B. Heffelfinger, United States Attorney, and David P. Steinkamp, Assistant United States Attorney, submits this response to the defendant's Position Regarding Sentencing Factors.

1. Use of Aliases

Defendant claims that he has never used the alias, "Big Guy." According to the probation officer who prepared the Presentence Report (PSR), the information regarding this alias was taken from the FBI's National Crime Information Center (NCIC), and the officer deems it to be reliable. All of the defendants aliases should be included in his PSR. Defendant's request to remove it should be denied.

2. Claim that the "Family Mob" was not a drug trafficking organization and that the defendant was a not a member.

The defendant objects to references in paragraphs 10, 12, 13, 14, and 16 that he was a member of the Family Mob street gang. Defendant argues that the Family Mob gang did not exist and even if it did, he was not a member. Overwhelming evidence at trial showed that the gang was real and that the defendant was a founding member. As such, he was part of a conspiracy that distributed large amounts of crack cocaine during the time alleged in the Indictment. He also was identified by members of the gang and others as a violent individual who regularly used and carried firearms as part of the gang's activities. Based on the record at trial, this information should remain in the PSR.

3. Claims that the defendant did not participate in the conspiracy after July 12, 2000.

At trial, the government proved that the defendant personally committed acts in furtherance of the Family Mob conspiracy up until he was incarcerated in state prison on July 12, 2000. In addition, the government presented proof beyond a reasonable doubt at trial that other members of the Family Mob conspiracy continued to commit acts in furtherance of the gang's objectives after the defendant was incarcerated. Finally, evidence was presented that the defendant, even after being incarcerated, never withdrew from the conspiracy. Defendant's claims are unfounded and without merit.

4. Objection to two point enhancement for possessing a dangerous weapon during a drug trafficking crime.

At trial, the government introduced over twenty firearms into evidence that had been seized from Family Mob gang members and stash houses. Based on this and other evidence, including the testimony of gang members, the jury found beyond a reasonable doubt that the defendant conspired to possess firearms during and in relation to the drug trafficking conspiracy alleged in Count 1. In order to find the two point gun enhancement applicable under the advisory guidelines, the Court need only find that it was probable that the weapon was connected to the drug offense of conviction. Here the evidence overwhelmingly supports such a finding. The defendant's claims should be denied.

4. Drug quantity attributable to the defendant.

The jury found the defendant and his coconspirators liable for conspiring to distribute in excess of 1.5 kilograms of crack cocaine. Defendant's claims that he is not responsible for this quantity is unfounded in either fact or law.

5. Claim that the offenses listed in Counts 5, 6 and 8 were not motivated by a thing of value.

The PSR properly concludes that the violent assaults charged in counts 5, 6 and 8 of the Indictment were motivated by an underlying desire to advance the Family Mob's ability to sell drugs in South Minneapolis by targeting rival gangs who operated in the Family Mob's territory.

Overwhelming evidence of the Family Mob's ongoing street war with rival gangs was presented at trial. Count 5 involved an incident where the defendant and other gang members were attempting to rob and shoot a rival gang member (Black P-Stones) who was present in Family Mob territory. Count 6 involved an incident where the defendant and another gang member used a 1/4 stick of dynamite to blow up a portion of the home lived in by the family of a Bogus Boy gang member who had earlier killed Darrel Bellamy, a member of the Family Mob. Count 8 involved an incident where the defendant shot at Bogus Boy gang members and hit an innocent bystander with gunfire, an act he admitted committing in a state court plea of guilty.

The defendant's underlying economic motivation to participate in these offense was further described by witnesses who testified at trial. A gang member witness told the jury that the members of the Family Mob were expected to retaliate against rival gangs that attacked the Family Mob in order to solidify the gang's reputation on the street, allowing easier street-level distribution of crack cocaine. Money was the underlying motivator for the defendant's actions and as such, the "motivated by value" enhancement is properly applied.

6. Consecutive penalties for violations of 18 U.S.C. 924(c).

The defendant claims he should not receive consecutive penalties for the two substantive convictions (Counts 4 and 10) for possessing and using a firearm during and in relation to a drug trafficking crime. The law is clear on this issue, and the appropriate sentence is five years consecutive for

Count 4 and twenty-five years, consecutive, for Count 10.

7. Commission of the instant offense within two years of release from custody.

The PSR correctly finds that the defendant began commission of the drug trafficking conspiracy within two years of his release from probation for Fleeing a Police Officer in a Motor Vehicle. Although defendant claims that there is no way to know when he joined the drug trafficking conspiracy, evidence presented at trial showed that the defendant joined the Family Mob conspiracy in the early 1990's, and that he was fully entrenched in the conspiracy by 1996. Defendant's claim should be denied.

8. Claim that the defendant's criminal history is overstated and a downward departure from the guideline range is warranted.

Defendant claims that he is entitled to a downward departure due to the "draconian nature of the drug sentences and the consecutive aspect of the gun charges" and because his criminal history is overstated. Neither basis provides a rationale for a downward departure.

If not for the fact that the defendant's total offense conduct totals 40, he would be probably be classed as a "career offender" based on his prior convictions for Fleeing a Police Officer and Assault in the Second Degree. He has been involved in criminal activity since he was a juvenile. His criminal history at a level III is not overstated.

9. The appropriate sentence.

The Defendant urges the Court to impose a sentence of 15 years, but this is too low. The defendant

and other members of the Family Mob conspiracy inflicted crack cocaine addiction and gun violence on a community in South Minneapolis for years. The defendant sold crack, carried guns, shot people, used explosives to terrorize rival gang members and committed other crimes. The federal drug and gun sentences properly punish this type of behavior.

The government urges the Court to impose a sentence, utilizing the factors set forth in 18 U.S.C. 3553(a), reflects the seriousness of the defendant's criminal actions in light of his extensive criminal history. The government requests the defendant be sentenced to a 360 month term for the drug conviction and a consecutive term of 30 years for the 924(c) offenses.

Respectfully submitted,

Dated: January 17, 2006

THOMAS B. HEFFELFINGER
United States Attorney

s/ David P. Steinkamp

BY: DAVID P. STEINKAMP
Assistant U.S. Attorney
Attorney I.D. No. 178470

APPENDIX F

[page 1]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,
Plaintiff,

vs.

Michael Greenlaw,

Defendants.

Criminal No. 03-107
(JNE/JGL)

Minneapolis, MN
January 19, 2006
2:00 p.m.

The above entitled matter came duly on for hearing before the Honorable Joan N. Ericksen, United States District Court Judge, on January 19, 2006, at the United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota, 55415.

APPEARANCES:

For the United States of America:

DAVID STEINKAMP
Assistant U.S. Attorney
300 South 4th Street
Suite 600
Minneapolis, MN 55415

For Defendant Greenlaw: JAMES SHEEHY
401 2nd Avenue South
Suite 840
Minneapolis, MN 55401

Court Reporter: Maria Weinbeck

* * * * *

[page 2]
1. THE COURT: This is United States versus
2. Greenlaw. Counsel, would you identify yourselves
3. for the record, please.
4. MR. STEINKAMP: Good afternoon, Your Honor.
5. David Steinkamp on behalf of the United States.
6. MR. SHEEHY: Good afternoon, Your Honor.
7. James Sheehy on behalf of Mr. Greenlaw who is present.
8. THE COURT: Good afternoon, Mr. Greenlaw.
9. Are you ready to proceed with sentencing?
10. MR. SHEEHY: Yes, Your Honor.
11. THE COURT: All right. Mr. Greenlaw, would
12. you come on up to the podium with your lawyer then?
13. Mr. Sheehy, I've read your position paper, and
14. I should begin by saying that I'm denying the motion for
15. a new trial, but on the sentencing, is there anything
16. that you wanted to say other than what you've already
17. submitted?
18. MR. SHEEHY: Yes, there is, Your Honor. But
19. before I get to that, I did make a note here, I believe

20. Mr. Greenlaw's former counsel made a motion for a
21. judgment of acquittal as well as a new trial, so I just
22. want to make sure that your ruling is covering both. I
23. don't know that –
24. THE COURT: Do you think they were filed on
25. separate days?

[page 3]
1. MR. SHEEHY: I think, it may have been one
2. document, but I believe. –
3. THE COURT: The motion filed by Mr. Malacko,
4. is that who it was? It was a one page and no memorandum
5. supporting, yes, the motion is denied.
6. MR. SHEEHY: Okay. Thank you. Your Honor, I
7. am requesting that the Court impose a sentence of
8. fifteen years in this case. I don't have time to review
9. everything, and I don't believe the Court wants me to
10. review everything with respect to objections to the
11. presentence report.
12. I realize that there was a trial in this case
13. and the Court will need to abide by the jury verdicts
14. now that it has denied those motions that were made by
15. Mr. Greenlaw's former counsel.
16. As Your Honor knows, the guidelines are
17. advisory, and thus the Court needs to look to the
18. statutory mandates in determining what is a reasonable
19. sentence in this case. And pursuant to 18 U.S.C.

20. Section 3553(a), the Court is to impose a sentence that
21. is sufficient, but not greater than necessary to comply
22. with certain purposes set forth in subparagraph 2.
23. That provision states that the Court must
24. consider the need for the sentence imposed to reflect
25. first the seriousness of the offense, promote respect

[page 4]
1. for the law and to provide a just punishment for the
2. offense. Fifteen years is a very substantial sentence.
3. I think it complies with all of those mandates.
4. I realize that by asking for this sentence,
5. the Court would need to consider the mandatory nature of
6. the consecutive sentences for Count 10, and I believe
7. it's Count 4, the two firearm offenses. I have not
8. found a case that's on point, but I believe that this
9. case is unique in that Mr. Greenlaw was serving time in
10. State Court on the very conduct that he was convicted of
11. in Count 10. He has been incarcerated since July 12 of
12. 2000, and he has been convicted twice for the same
13. conduct, Now, the government may put a spin on it.
14. There's some different elements in Count 10, but

15. essentially it's the same conduct. That Count should
16. not be consecutive.
17. I think this is a unique case that would allow
18. the Court to avoid what is in the statute deemed to be a
19. 25 year consecutive sentence. That sort of sentence is
20. more than is needed under this statute, this 18 U.S.C.
21. Section 3553(a) to fulfill the purposes of the statute.
22. The next consideration is the deterrence of
23. criminal conduct. Again, fifteen years is more than
24. adequate to deter criminal conduct of which he's been
25. convicted. That is a very substantial sentence. It

[page 5]
1. would provide specific deterrence as well as general
2. deterrence of others.
3. It also fulfills sub 2(c) which is to protect
4. the public from other crimes of the defendant. This is
5. a situation where if he is incarcerated for fifteen
6. years, he's going to be in his 40's when he gets out.
7. Again, a fifteen-year sentence fulfills that provision.
8. With respect to another consideration, the
9. Court considers the need to provide the defendant with
10. educational or vocational training, medical care or

11. other correctional treatment in the most effective
12. manner. Fifteen years meets that. Mr. Greenlaw, I
13. don't believe graduated from high school. I believe he
14. probably should get his GED. He'll be able to do that.
15. A fifteen-year sentence fulfills that provision.
16. The Court also needs to consider the kinds of
17. sentences available. Well, the Court has to deal with
18. mandatory minimums. This isn't a probationary case. I
19. realize that. I believe the Court should impose the
20. least sentence possible in this case. And by doing so,
21. the Court will fulfill all of the statutory criteria.
22. The Court will provide a basis for Mr. Greenlaw to come
23. out and live a useful life. He has children. He has
24. family -- a lot of them are here. Following what the
25. government's want, it won't provide that chance. And

[page 6]
1. the time they want is much greater than is needed to
2. fulfill the statutory criteria.
3. Your Honor, I know this is a case you sat
4. through on the trial. I've stated objections that are

5. based on I think a fair reading of what the law requires
6. for in particular a gun enhancement that the government
7. has now piled on. They want to bring him up to level
8. 40. There is not a basis in the jury verdict for that.
9. And here's, you know, Assistant U.S. Attorney saying put
10. him at level 40 right off the bat. It's just not fair,
11. and it's not allowed by the law.
12. Your Honor, finally I am requesting on Mr.
13. Greenlaw's behalf that you recommend to the Bureau of
14. Prisons that he be placed in a facility as closest to
15. Minnesota as possible. That's his desire.
16. So in conclusion, Your Honor, fifteen years is
17. adequate. If the Court doesn't feel that that is
18. adequate, I would say the least amount of time that is
19. allowed by the law above that is what the Court should
20. impose here. Thank you.
21. THE COURT: Okay. Let me make sure I
22. understand? Fifteen years is you're saying is the
23. mandatory minimum, but then that would be nothing on the
24. conspiracy?
25. MR. SHEEHY: No. I'm sorry, I should have

[page 7]
1. clarified that. Perhaps that wasn't set forth clearly
2. enough.
3. THE COURT: The guidelines on Count 1 as

4. calculated by the probation officer are 360 to life.
5. And then you've got mandatory minimums over that, so
6. just tell me how you –
7. MR. SHEEHY: My position is that the ten-year
8. mandatory minimum on the conspiracy count is ten years,
9. so that's the first part of it. And then the five year
10. consecutive on Count 4 is how I get to fifteen years.
11. So I'm asking for the mandatory minimum sentence under
12. the statute for those two counts.
13. I realize that the Probation Office calculated
14. a 25-year mandatory minimum on Count 10, and I'm asking
15. the Court not to impose that.
16. THE COURT: Well, let me just tell you on
17. Count 10, and Mr. Steinkamp, let me know if you want to
18. be heard, but in my view, Count 10, I am not going to
19. impose a 25 year consecutive mandatory minimum because I
20. just don't agree that it qualifies as a subsequent -- as
21. a second or subsequent conviction under the subsection
22. because that would be second or subsequent to something
23. that was charged in the same indictment.
24. But if you look at 924(c)(1)(A)(3), the
25. statute says if the firearm is discharged, there's a

[page 8]
1. ten-year mandatory minimum. And the jury verdict, the
2. jury found that there was a discharge of a firearm in
3. connection with Count 10. They circled possessed,
4. brandished, and discharged. So I don't think that 25 is
5. the right number, but it seems fairly clear that there's
6. a ten-year mandatory minimum that applies to Count 10.
7. But anyway, you would like to somehow go below that. I
8. mean I just want to make sure that I'm understanding the
9. argument is all.
10. MR. SHEEHY: Right. Well, my same argument
11. would apply. And it's based in part, Your Honor, on
12. fairness to this young man who pled to essentially the
13. same elements in State Court in the year 2000.
14. THE COURT: I'm going to give him credit for
15. that time just so you know.
16. MR. SHEEHY: Okay. So that's my argument. I
17. realize the statutes have mandatory language in it. I
18. do believe situations can arise where the Court can
19. eschew the literal language of a statute, and this is
20. one of them. I haven't found a case that is on all
21. fours with this one.

22. THE COURT: Okay. Thank you, Mr. Sheehy.
23. Mr. Greenlaw, I am going to hear from you, but
24. first let me hear from the government.
25. Mr. Steinkamp, first of all, on the

[page 9]
1. guidelines, that 25 mandatory minimum, do you have any
2. -- is there anything that you wanted to say about that?
3. I think it's a ten-year mandatory minimum, not a 25.
4. MR. STEINKAMP: I understand the Court's
5. position on that, and that would be a reasonable
6. reading. Because it wasn't raised by defense counsel, I
7. didn't brief it. I have a recollection, Your Honor,
8. that the conviction does not have had to have occurred
9. at a moment in time prior to the second offense
10. occurring. I have some recollection of the law that,
11. and I'm sorry it's a general recollection now that they
12. can be charged in the same indictment. And once the
13. conviction occurs as per in Count 4 by the jury, then
14. the next one is in fact a subsequent conviction.
15. THE COURT: Okay. I'll just tell you.
16. MR. STEINKAMP: Maybe you've read something
17. differently.
18. THE COURT: No, let me just tell you my

19. reasoning on it, and my ruling is I'm going to do
10
20. instead of 25, and I'll just tell you why. I'm not
so
21. sure that you're convicted when the jury finds
you
22. guilty. I think that that's a finding of guilt, but in
23. connection with sentencing is when the
defendant is
24. considered and adjudged to be guilty of the offense.
25. So in my view, he's not convicted until today, and
I

[page 10]
1. will find that he is convicted today.
2. I also think that the rationale of the 25-year
3. mandatory minimum is inconsistent with someone
4. committing a gun offense, for example, on Monday
and
5. Tuesday, and the Monday offense is a five year
mandatory
6. minimum, and the Tuesday offense is a 25 year
mandatory
7. minimum, and nothing happened in between. It
just
8. doesn't make sense to me. So –
9. MR. STEINKAMP: I understand, Your Honor.
10. THE COURT: -- in the absence of some clear
11. direction to the contrary, the only thing that seems
12. fair and reasonable to me is that it's 10 instead of
25,
13. and so that's my thinking on that.
14. MR. STEINKAMP: Okay. In order to preserve

any potential appeal, I would simply object to that
finding. And if the Court would like me to write a
brief on this before you made a final ruling, I could do
it. Otherwise, if you are ready to go, I just want to
preserve my objection to that, and my potential to argue
it in the future if I need to.
THE COURT: That's fine, and no offense taken
on that, but I feel confident enough that I'm not going
to ask you to brief it.
MR. STEINKAMP: I understand. So just to get
a bit of a lay of the land then in terms of the Court's

[page 11]
thinking, we have the guideline sentence plus five plus
ten is where we're really talking about in terms of
sentencing with that ruling in mind.
THE COURT: Right. And I am of a mind to give
him 62 months credit for the time that he spent in State
Court.
MR. STEINKAMP: And I agree that he should get
all the credit from the time that he's been incarcerated
on that offense as it's relevant conduct to the other
offenses.
So, Your Honor, then I want to state that I

12. believe that the PSR got it right when it found that the
13. defendant was a criminal history category 3. That he
14. should also start at a level 40 because he's got 38 for
15. the base offense level. That was found by the jury.
16. That seems to me to be uncontrovertable in terms of
17. applying the guidelines.
18. We've got a finding of 1.5 kilograms of crack,
19. and so -- or in excess of that, so we're at 38. I guess
20. the only area of real contention that affects the
21. guideline sentence is the two points for the gun.
22. And if the Court's not of a mind to consider
23. the guns that were the subject of Counts 4 and 10 in
24. making the enhancement, let me refresh your
25. recollection, and you may already have this

[page 12]
1. recollection. Mr. Greenlaw -- there was evidence put
2. into the record that on February 9 of 1997, Mr. Greenlaw
3. was stopped in a car in Minneapolis and tucked up behind
4. the dash was a firearm. And it was a Ruger
5. semi-automatic pistol. We had the officer who found it
6. testify, and there was no substantive count on that

7. point, but I would submit to you that the jury used that
8. evidence in making their decisions. And I would submit
9. to you that that would show that possession of that
10. firearm was not clearly and probably connected to the
11. offense.
12. Plus, you had all the testimony from Everett
13. Jones regarding the fact that the gang used guns. The
14. gang had guns that were never recovered by the police,
15. and that the defendant was a member of the gang and was
16. expected to participate in the gang's activities that
17. the gang shared guns. I think there was overwhelming
18. evidence that the Court could find that the two points
19. apply.
20. So with that, Your Honor, unless you have any
21. other questions of me, I don't have anything further on
22. the guideline analysis. So that would put it in my mind
23. at 360 to life. And I've asked you to give him the
24. bottom of the guideline range at 360.
25. You know, just responding to the

[page 13]
1. appropriateness of sentences, I just have to say that

2. fifteen years is too low. This isn't an AUSA saying
3. this. This is the government applying the law to the
4. facts that were presented. And as the Court heard, this
5. Family Mob gang was a terror in South Minneapolis,
6. slinging crack at all hours of the day and night,
7. ruining neighborhoods, ruining people's lives with crack
8. addiction, shooting at each other, shooting at rival
9. gangs, hitting innocent bystanders with gunfire.
10. There was evidence presented that one of the
11. members of the gang had killed another person during a
12. drug rip. I mean this is not a -- this is not just a
13. collection of drug dealers. This is something much
14. more, and they are much greater than the sum of their
15. parts when they are acting together.
16. Gangs are a scourge. Gangs are a danger, and
17. they need to pe punished. People need to know that if
18. you join into these kind of organizations, there's going
19. to be a price to be paid. And here the price should be
20. quite high. And that's all I have, Your Honor.
21. THE COURT: Mr. Sheehy, anything else that
22. those comments raise, guideline-wise or otherwise?
23. MR. SHEEHY: Your Honor, I did just want to
24. respond to the two-point enhancement. I think this
25. would be a classic case where if the Judge found that

[page 14]
1. two-point enhancement, you'd be violating the precepts
2. of the Booker decision. The jury didn't make that
3. finding. He's arguing evidence was presented to the
4. jury so the Judge should make the finding. We don't
5. know if the jury believed what was said. We don't know
6. if there's a tie-in between the gun he says was found

7. and the count of conviction. So I don't think there's a
8. basis legally for Your Honor to find it. I do believe
9. that the minimum sentence should be imposed based on
10. what I've argued, and at fifteen years it is sufficient
11. to meet all the requirements of the law and the concerns
12. that counsel has stated. Thank you.
13. THE COURT: Let me just think, but he was
14. convicted of Count 2, so, Mr. Sheehy, under your
15. analysis what would happen to the conviction for
16. conspiring to possess firearms during in and in relation
17. to a drug-trafficking crime? He would get nothing for
18. that then?
19. MR. SHEEHY: Your Honor, I'll need to take a
20. look at that Count.
21. THE COURT: Because I certainly agree that
22. it's not appropriate to have a Court finding of use of a
23. firearm, but there's not a Court finding. I'm looking
24. at a jury verdict, finding of guilty of using and
25. carrying a firearm in relation to drug trafficking. And

[page 15]
1. so I guess maybe what you are saying is that that should
2. be separately counted rather than aggregated with the
3. base offense level of 38 that comes from Count 1?
4. MR. SHEEHY: Your Honor, if my recollection of
5. the presentence investigation report is correct is that
6. Count 2 -- my understanding is it didn't enhance the
7. offense level. It was one of the counts that was
8. grouped. I don't know if that answers the Court's
9. question.
10. THE COURT: It sort of does except I'll tell
11. you, if I gave him the two level enhancement, it would
12. be because he was found guilty not because I remember

13. that there was all this testimony about guns. I do, but
14. I don't think it's my job to be making those findings.
15. Can I just hear from the government on that
16. point? Mr. Steinkamp, I'll just tell you that I'm not
17. going to independently find that there was a gun. I
18. remember there was a gun. As a matter of fact, there's
19. plenty of evidence that was there a gun used in
20. connection with it. I just don't think under Booker I
21. can make that determination, but Count 2 does charge the
22. use of firearms in relation to the drug trafficking, and
23. he was found guilty of that. So what's your view about
24. whether that ought to be part of the base offense level
25. or be a separate grouping?

[page 16]
1. MR. STEINKAMP: Well, because I'm looking at
2. that analysis in light of the fact that the guidelines
3. are advisory, and the fact that he is still in my
4. belief, and I'm not trying to argue with your
5. interpretation of the law, but in my understanding of
6. the case law that's come since Booker, specific offense
7. characteristics are still part of the guideline
8. analysis, and I still think the Court can find that.
9. I suppose the only problem that I see with
10. Count 2 is that the crime is conspiring to use and
11. possess guns, and there's not a real gun that was ever
12. named in that Count, and there was no specific gun ever
13. presented to the jury that relates to the defendant.
14. I'm simply saying to you that I think under your

15. application of the guidelines, considering the fact that
16. they're advisory, you could easily find from the record
17. a two-point gun enhancement, but if you don't, I also
18. understand the Court's reasoning.
19. THE COURT: All right. Let me just make my
20. findings with respect to what the guidelines are, and
21. then I'll hear from you, Mr. Greenlaw, before I impose
22. sentence.
23. I find that the total offense level is 38, and
24. that the defendant has five criminal history points
25. putting him in a category 3. So that is a guideline

[page 17]
1. range of 292 to 327.
2. MR. STEINKAMP: Your Honor, I'm sorry to
3. interrupt. 292 to 365, I believe.
4. THE COURT: 365. And then just to address
5. specifically some of the objections that were made, I'm
6. not counting the two points for the gun as we've just
7. discussed. I am not, in connection with the Counts, the
8. paragraphs, Mr. Sheehy, where you pointed out that there
9. would have to be a Court finding that it was done for
10. the purposes of value. I'm not adding those. Now that
11. doesn't really effect the calculation, but that would

12. bring paragraph 32 which has a, I think, a 16 would go
13. down to a 14. The 20's would go down to 18. That
14. relates to paragraph 38 and 44, but because of the
15. grouping, it doesn't have a real life consequence.
16. MR. STEINKAMP: Could I be heard on that
17. point, Your Honor, just for the clarification of the
18. record?
19. THE COURT: Sure.
20. MR. STEINKAMP: I totally understand the
21. Court's ruling on that, and I think you said that if you
22. were basing that on the fact that a jury hadn't returned
23. a specific finding on that point, it is not a
24. reflection, I'm taking it, of the Court's view of the
25. evidence presented at trial that would tend to show that

[page 18]
1. these were racketeering acts; is that a fair assumption
2. on my part?
3. THE COURT: Correct. Right. But I just think
4. that in order to actually add two points under the
5. guidelines, there would have to be a jury finding. And
6. –
7. MR. STEINKAMP: I understand. I just want to
8. make sure that was the limited ruling on the application
9. of those guideline factors and not it was not a comment
10. on the evidence at trial or anything like that.

11. THE COURT: No, no, no. And I think the
12. government has accurately set forth a summary of what
13. the trial evidence was. There is no question about
14. that.
15. All right. Now, the question is what sentence
16. to impose. And in that regard, Mr. Greenlaw, I'd be
17. happy to hear anything that you have to say in your own
18. behalf.
19. THE DEFENDANT: First, I would like to ask you
20. why I'm being shackled down. I mean I want to blow my
21. nose. I want a cup of water. Can you tell me the
22. reason why you told the marshal to shackle me in
23. handcuffs?
24. THE COURT: Right now is your chance to talk
25. about anything that you want to say before I impose

[page 19]
1. sentence.
2. THE DEFENDANT: Yes, I feel uncomfortable
3. right now. My nose is running. I want a drink o£
4. water. I mean I feel like I'm treated less than a human
5. right here and now. I do have a right to drink some
6. water and get my nose. I mean it's totally
7. uncomfortable. I just want you to state for the record
8. why you got me in handcuffs? That's all.
9. THE COURT: Well, we're not going to have that

10. conversation. So is there anything that you want to say
11. about sentencing?
12. THE DEFENDANT: I feel that the damage already
13. been done when Judge Lebedoff didn't take Richard
14. Malacko off my case. I feel like Richard Malacko was in
15. cahoots with the prosecutor. I feel that I had a
16. totally unfair trial. I feel like this is a malicious
17. prosecution. I just want the higher courts to
18. investigate Mr. Steinkamp and the Grand Jury findings.
19. And that's it.
20. THE COURT: Okay. Who is our head marshal
21. here? Could I just see you for a second?
22. (Off the record discussion.)
23. THE COURT: I'm going to unshackle your hands,
24. and ask the marshal to unshackle them.
25. THE DEFENDANT: Thank you.

[page 20]
1. MR. SHEEHY: Do you want some water?
2. THE DEFENDANT: Yeah. How about the legs?
3. THE COURT: We'll leave the legs. We're
4. almost done here. And do you need -- oh, there you go.
5. THE DEFENDANT: Thank you.
6. THE COURT: Yeah. Sorry about that. All
7. right, Mr. Greenlaw, it's been a while since we've had
8. the trial, but the details of the crime that came out at
9. trial and upon which the jury found you guilty are
10. remarkable. The level of criminal conduct here is

11. extremely serious. And there was a lot of testimony
12. about a lot of harm that was done. And I'm sorry for
13. you that you got yourself involved in that kind of a
14. life and got so deeply involved in it.
15. The total sentence, and I'm first going to
16. tell you the total number, and then I'll tell you how I
17. got there is 442 months. Now, that's I'm starting with
18. 324 on Count 1, but then I'm giving you 62 months credit
19. because you did State time, and I don't see why you
20. would have to do double time for the same thing. So 324
21. minus 62 is 262 on Count 1.
22. And then 240 months on each of Counts 2, 6,
23. and 8. And 36 months on Count 5, and that's all to be
24. served concurrently. So there's no additional time on
25. that.

[page 21]
1. But then there is under the law required
2. mandatory consecutive time, and I'm going to give you
3. the minimum on those Counts, but that is 60 months on
4. Count 4 to be served concurrently to the terms imposed

5. on Counts 1, 2, 5, 6, and 8. And then 120 months which
6. is the minimum on Count 10 to be served consecutively to
7. the terms imposed on 1, 2, 4, 5, 6, and 8. And so the
8. 262 plus the 60, plus the 120 is 442, so that's how we
9. get to that.
10. Your financial situation is such that in my
11. view you can't afford to pay a fine, so there's no fine
12. imposed.
13. Once you are released, you'll be on supervised
14. release on a number of terms and conditions. One, that
15. you not commit any more crimes, federal, state, or
16. local.
17. Two, that you abide by the standard conditions
18. of supervised release recommended by the Sentencing
19. Commission.
20. Three, that you refrain from possessing a
21. firearm, destructive device, or other dangerous weapon.
22. Four, that you participate in a program for
23. drug and alcohol abuse if one is recommended by the
24. probation officer, and that might include inpatient or
25. outpatient treatment or support group or whatever it is.

[page 22]
1. Comply with that.

2. But separate from that, the law requires that
3. you undergo drug testing, so that's ordered.
4. And separate from that, you are required under
5. law to cooperate with the collection of DNA. The law
6. says we have to get it, and so I'm ordering that you
7. cooperate in the collection of that.
8. And I'm also going to order as a condition of
9. supervised release that you cooperate with whatever the
10. probation officer wants you to do in regards to getting
11. your GED or your education.
12. And then the only other component of the
13. supervised release has to do with gang association and
14. that's that you are not to associate with any member,
15. prospect, or associate member of the Family Mob gang or
16. any other gang. And if you are found to be in the
17. company of such individuals while wearing colors,
18. clothes, insignia, or other indications of the gang,
19. there will be a presumption that you are doing that for
20. the purpose of participating in gang activities. Those
21. are the conditions of supervised release.
22. Because there were seven counts of conviction,
23. there has to be a $700 special assessment, and that's
24. due and payable immediately. That goes to the Crime
25. Victims Fund.

[page 23]
1. In my view, this is the sentence that's
2. required by law and reflects the seriousness of the
3. crime, and yet is not any greater than is necessary to
4. accomplish the goals of sentencing.
5. You have a right to appeal your conviction and
6. your sentence. And as I said, you are considered and
7. adjudged today that you are guilty of the crimes of
8. which the jury found you guilty. If you do want to
9. appeal, you have to get your notice of appeal filed
10. within ten days. It's a required time limit. If you
11. let it go by, then you lose that opportunity. So if the
12. government wants to appeal, they know their own rights.
13. I will recommend that you serve your time as
14. close to Minnesota as possible because you will be
15. presumably living in Minnesota when you are released,
16. and you've got family support here, so I think it's in
17. your interest that if it's consistent with the Bureau of
18. Prisons security calculations and designations and the
19. room that they've got and programming and everything,
20. that you serve your time as close to Minnesota as
21. possible.
22. Mr. Sheehy, is there anything else?
23. MR. SHEEHY: No, Your Honor.
24. THE COURT: Mr. Steinkamp?

25. MR. STEINKAMP: Could I have just a moment,

[page 24]
1. Your Honor? I need to check –
2. I may be mistaken, Your Honor, but I thought I
3. heard you say it's 60 –
4. THE COURT: I did. I thought that was implied
5. because you would never get to that total amount of
6. months.
7. MR. STEINKAMP: I know this is going to be a
8. hotly contested appeal, and I just want the record to be
9. very clear.
10. THE COURT: Yeah, I don't think that there
11. isn't any choice in that matter, and if I said
12. concurrent, I misspoke. I meant consecutive. So it's
13. the 60 months is consecutive and the 120 months is
14. consecutive. The mandatory minimum gun counts, so at
15. least we're clear. Is that clear to everybody?
16. MR. SHEEHY: Yes.
17. THE COURT: Mr. Duncan?
18. PROBATION OFFICER: What was your position on
19. the restitution?
20. THE COURT: Yeah, if – we'll keep the
21. restitution issue open for 90 days just to see if
22. there's a request from the victim. So far there isn't
23. -- there hasn't been one, but there's a ninety-day
24. window for that. And if we hear anything from the
25. victim on that, then I'll let you know and impose the

[page 25]
1. restitution. That would be for the shooting. The
2. person that was shot in the leg. Okay. Thank you.
3. Good luck, Mr. Greenlaw.
4. (End of proceedings.)
5.
6.
7. UNITED STATES DISTRICT COURT)
8.) ss.
9. DISTRICT OF MINNESOTA)
10.
11. REPORTER'S CERTIFICATE
12. I, MARIA WEINBECK, Official Court Reporter in
13. and for the United States District Court,
14. District of Minnesota, do hereby certify that
15. the foregoing transcript is a true and correct
16. transcript of the proceedings had in the above
17. matter as herein set out.
18.
19.
20.
21. Dated: /s/ 2-17-06 /s/ Maria Weinbeck
22. Maria Weinbeck
23. Court Reporter
24.
25.
[End]

APPENDIX G

UNITED STATES DISTRICT COURT
District of Minnesota

UNITED STATES OF AMERICA, Plaintiff,	)	
V.	)	**NOTICE OF APPEAL**
Michael Jason Greenlaw, Defendant.	)	Criminal Case Number: 03-107 (04) JNE/SRN

NOTICE OF APPEAL

Notice is hereby given that Michael Jason Greenlaw, Defendant, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment, conviction and sentence entered in the above-captioned case on January 19, 2006 before the Honorable Joan Ericksen.

Dated:
January 26, 2006 /s/ Kassius O. Benson

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cc: David Steinkamp, AUSA

APPENDIX H

In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

UNITED STATES OF AMERICA,
APPELLEE,
v.
MICHAEL GREENLAW AND
LAQUAN DEWAYNE CARTER,

APPELLANTS.

No. 06-1365 and 05-3391
Criminal
Appeal from the United States District Court for the District of Minnesota

---

BRIEF OF APPELLEE

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* * *

SUMMARY OF THE ARGUMENT

The District court did not plainly err when it denied defendant Greenlaw's motion for severance from his codefendant because the defendant failed to show the district court that he suffered any prejudice from joinder with his codefendant Carter.

Defendant Greenlaw never made a clear and unequivocal request to represent himself. Accordingly, the district court did not err when it refused to discharge defendant Greenlaw's appointed trial counsel.

The district court properly denied defendant Carter's Batson challenge on the ground that the attorney for the government provided a race-neutral explanation for exercising a peremptory strike.

The evidence, viewed in the light most favorable to the government was sufficient for the jury to find that defendant Carter was a member of a conspiracy that distributed crack cocaine in Minneapolis from at least1996 to 2003. Members of the gang, police officers, and others testified that the defendant and other members of the Family Mob pooled their money, staked out territory and acted as an organization in distributing crack cocaine.

The district court did not err in sentencing defendant Greenlaw to 442 months imprisonment. First, the district court was aware of its authority to depart for overstated criminal history and its denial of

the motion to depart is unreviewable. Second, the district court considered the evidence presented at trial, the defendant's personal characteristics and the goals of sentencing and found the sentence of 442 months to be reasonable.

* * *

V. THE DISTRICT COURT DID NOT ERR IN SENTENCING THE DEFENDANT TO 442 MONTHS IMPRISONMENT.

A. Motion for Downward Departure.

Defendant Greenlaw first argues that his criminal history score was overstated and the district court erred in denying a downward departure under U.S.S.G. § 4A1.3. He contends his criminal history is largely comprised of older offenses and the Court should have found him to be a level II offender, instead of a level III.

The discretionary denial of a motion for downward departure is unreviewable unless the court failed to recognize its authority to depart. United States v. Andreano, 417 F.3d 967, 970 (8th Cir. 2005) (citing, United States v. Kelly, 329 F.3d 624, 630 (8th Cir. 2003)).

Here, the district court was well aware of the ability to depart on U.S.S.G. § 4A1.3 grounds, but declined to do so. Greenlaw Sent. Tr. 16. The district court's decision is unreviewable. Defendant's appeal on this issue should be denied.

B. Reasonableness of the Sentence.

Defendant Greenlaw claims that the 442-month sentence he received was unreasonable and that a 15-year sentence would have been warranted.

When reviewing a sentence, the standard is whether the district court abused its discretion by imposing an unreasonable sentence on the defendant. United States v. Haack, 403 F.3d 997, 1003 (8th Cir. 2005).

A sentencing court abuses its discretion if it fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but commits a clear error of judgment "by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case." United States v. Haack, 403 F.3d 997, 1004 (8th Cir. 2005). "In the context of reviewing a sentence for reasonableness, a proper or relevant factor is one listed under § 3553(a)." United States v. Long Soldier, 431 F.3d 1120, 1123 (8th Cir. 2005).

The district court found the appropriate guideline range for Counts 1, 2, 5, 6 and 8 to be 292 to 365 months. The district court imposed a sentence in the middle of the range, 324 months. Greenlaw Sent. Tr. 17. The district court gave the defendant 62 months credit for time served, resulting in a total sentence of 262 months for Counts 1 and 2 to be served concurrently. Because the statutory maximums for counts 5, 6 and 8 were less than 262 months, the Court imposed the statutory maximum sentence for each of

these counts, to be served concurrent to each other. Although the Sentencing Guidelines are now advisory, a sentence within the applicable range is presumptively reasonable. United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005).

After determining the guideline sentence for counts 1, 2, 5, 6 and 8, the district court moved to the mandatory statutory sentences to be imposed for counts 4 and 10. Although 18 U.S.C. § 924(c) required a 5-year sentence on Count 4 (consecutive to the 262 month guideline sentence) and a 25-year sentence, consecutive to the previously imposed sentences, the court gave the defendant 5 years consecutive for Count 4 and 10 years consecutive for Count 10, resulting in a total sentence of 442 months rather than 662 months. Tr. 20.

The defendant is a 27-year old man with an extensive and serious criminal record, who engaged in many acts of drug dealing and violence related to drug trafficking. As the district court stated, "the details of the crime that came out at trial and upon which the jury found you guilty are remarkable. The level of conduct here is extremely serious. And there was a lot of testimony about a lot of harm that was done." Greenlaw Sent. Tr. 20.

The district court considered the factors set forth in 18 U.S.C. § 3553(a), the defendant's unique characteristics and his crimes and sentenced him to 442 months, 220 months less than the lowest sentence recommended by the guidelines and the mandatory statutory minimums. The district court did not abuse its discretion when it sentenced the defendant to a term substantially less than the guidelines recommended.

The district court's sentence was not unreasonable and defendant's claim must fail.

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPELLATE CASE NO. 06-1365

United States of America,

Appellee,

vs.

Michael Jason Greenlaw,

Appellant.

PETITION FOR HEARING OR REHEARING EN BANC BY APPELLANT, Michael Jason Greenlaw

---

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INTRODUCTORY STATEMENT

In December of 2004, Appellant, Michael Greenlaw, was convicted by a jury on seven counts of criminal activity alleging various claims of drug trafficking, conspiracy, and firearm possession occurring on dates ranging from 1996 through 2003. Following the conviction, on January 19, 2006, Appellant received a 442 month prison sentence. Appellant made a timely appeal to the Eighth Circuit Court of Appeals requesting that his conviction and sentence be reversed on several grounds. The United States government did not appeal the sentencing.

On March 23,2007, the Eighth Circuit Court of Appeals issued a panel decision denying the relief sought by Appellant. The panel also decided, sua sponte, to vacate Appellant's sentence and to remand the case for the purpose of resentencing Appellant to an additional term of 180 months (15 years). In reaching its decision, the panel relied upon Fed. R. Crim. P. 52(b) to find that the district court's plain error in sentencing seriously affected the substantial rights and the fairness, integrity, and public reputation of judicial proceedings.

The panel decision presents a question of exceptional legal and practical importance. Specifically, the panel decision has subjected Appellant to a 15 year increase in sentence where the government did not appeal the district court's 442 month sentence. The instant case does not warrant the implementation of the panel's discretion and action *on its own motion*. A particular question therefore is whether the imposition of a 442 month sentence rather than a 622 month sentence seriously affected the

fairness, integrity, or public reputation of judicial proceedings.

Appellant submits that the exceptional legal and practical implications of the panel decision, specifically an extension of a nearly 40-year sentence by 15 more years, warrants a consideration by the Court of Appeals en banc. Appellant therefore makes this Petition for Rehearing En Banc pursuant to Fed. R. App. P. 35(b)(I)(B).

STATEMENT OF THE CASE

Appellant was charged by indictment with seven counts of criminal activity including: Count 1 - Conspiracy to Distribute and Possess with Intent to Distribute in Excess of 50 Grams of Cocaine Base; Count 2 - Conspiracy to Possess Firearms During and in Relation to a Drug Trafficking Crime; Count 4 - Carrying a Firearm in Relation to a Crime of Violence; Count 5 - Conspiracy to Assault with a Dangerous Weapon; Count 6 - Assault with a Dangerous Weapon; Count 8 - Assault with a Dangerous Weapon; Count 9 - Carrying a Firearm in Relation to a Drug Trafficking Crime; and Count 10 - Carrying a Firearm in Relation to a Crime of Violence. More specifically, the government alleged that Mr. Greenlaw and others conspired as part of the "Family Mob gang" to engage in drug trafficking in Minneapolis, Minnesota during the period from 1996 until 2003.

In December of 2004, Appellant stood trial before a jury on the above charges. The jury returned verdicts of guilty on Counts 1, 2,4, 5, 6, 8, and 10. Mr. Greenlaw was found not guilty on Count 9 of the indictment. The district court sentenced Mr. Greenlaw

to a total of 442 months in prison; a sentence of over 36 years.

The district court explained the sentence as follows: the district court sentenced Mr. Greenlaw to 262 months on Count 1 concurrent with 240 months on each of counts 2,6, and 8, and 36 months on Count 5 (all to be served concurrently). The court then gave 60 months on Count 4 to be served consecutively to the terms on Counts 1, 2, 5,6, and 8; and 120 months on Count 10 to be served consecutively to the other terms. *See Judgment in a Criminal Case dated January 19, 2006* at page 2. *See also Sentencing Transcript dated January 19, 2006* at 20. The district court found that Count 10 was not a second or subsequent conviction under 18 U.S.C. section 924(c)(1)(C) because Appellant was only convicted at the entry of judgment of conviction. Based on this determination, the district court declined to sentence Appellant to the additional 25 year statutory mandatory sentence provided by Section 924 (c)(1)(C). Appellant, having been sentenced to the 442 months, filed an appeal challenging his conviction and sentence. The government did not appeal the 442 month sentence.

On March 23, 2007, a panel decision was issued in Appellant's case. The panel denied Appellant's grounds for appeal. Despite the fact that the government did not appeal the sentencing of 442 months, the panel addressed the issue and found that the district court committed plain error in sentencing because Appellant was actually "convicted" when the jury found him guilty, not at the entry judgment of conviction. The panel further exercised discretion per Fed. R. Crim. P. 52(b) stating that the district court's error "seriously affects substantial rights and the

fairness, integrity, and public reputation of judicial proceedings". In exercising that discretion, the panel vacated Appellant's sentence and remanded to the district court for resentencing and imposition of an additional 180 months, or 15 years. Appellant makes this timely petition for rehearing *en banc*.

ARGUMENT

THE PANEL'S DECISION TO EXERCISE DISCRETION UNDER FED. R. CRIM. P. 52(b) AND REMAND FOR RESENTENCING SHOULD BE REHEARD EN BANC BECAUSE ANY ERROR BY THE DISTRICT COURT IN SENTENCING DEFENDANT TO 442 MONTHS DID NOT SERIOUSLY AFFECT FAIRNESS, INTEGRITY, OR THE PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS.

Appellant requests that the Court to grant hearing or rehearing *en banc*. The panel decided the relevant sentencing issue in this case on its own motion. The government did not appeal the district court sentence. Appellant submits that the issue should not have been addressed by the panel because any error by the Court did not seriously affect the fairness, integrity, or public reputation of the criminal trial process in this case.

The federal courts have provided guidance as to when an appellate court may exercise discretion to address an error not raised by counsel. Before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *United States v. Cotton*,

535 U.S. 625 (quoting *Johnson v. United States*, 520 U.S. 461, 466-67 (1997)). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, ***but only if*** ***(4) the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."*** Id. (citing *Johnson v. United States*, 520 U.S. at 467 (emphasis added).

In the instant case, the panel relied upon *Deal v. United States*, 508 U.S. 129, 132 (1993) (declaring "in the context of section 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury . . .") to find that the district court committed plain error when it found that Appellant was not "convicted" upon jury verdict. Citing *United States v. Burnett*, 410 F.3d 1048 (8th Circuit 2005) and *United States v. Campos*, 362 F.3d 1013, the panel decided that the error affected the substantial rights of the government and the people of United States. *Panel slip opinion at 9.* However, finding that the district court's error affected substantial rights was not enough in this case.

Even if the district court committed error at Appellant's sentencing which affected substantial rights, the panel was still limited in whether it should have exercised discretion and acted on its own to address the issue. The panel should have acted *only if* the district court's error in handing down a 442 month sentence; a sentence of almost 37 years, "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings". *United States v. Cotton*, 535 U.S, 625 (quoting *Johnson v. United States*, 520 U.S. 461, 466-67 (1997)).

In this case, the district court's error did not affect the fairness, integrity, or public reputation of judicial proceedings. Appellant received a sentence of 442 months. Appellant's sentence was the equivalent of almost 37 years; of almost 4 decades. Appellant will be in his late 60's should he survive the 442 month sentence. The severity of the sentence imposed by the district court was in no "unfair" to the government or the public. Moreover, the length of a 442 month sentence cannot be said to impugn the integrity or public reputation of the judicial system simply by virtue of the magnitude of the time imposed. As stated above, Appellant will be serving most of his natural life in prison based upon the sentence imposed by the district court of 442 months. Surely, the public reputation of the judicial system is intact with the assurance that Appellant will received such a consequence at the trial level. The addition of another 180 months to Appellant's does nothing to serve the interests of fairness, integrity, or the public reputation of the judicial proceedings in this particular case.

Further, even though the district court's error implicated a statutory mandatory sentence, the panel did not have to address an issue that was not raised on appeal by the government. For example, in a Seventh Circuit case, *United States v. Rivera*, 411 F.3d 864, 867 (7th Circuit) (cert. denied, 126 S.Ct. 493 (2005)), that court refused to correct a sentence that was below the statutory mandatory minimum reasoning that "[b]y deciding not to take a cross-appeal, the United States ensured that [the defendant's] sentence cannot be increased"). Here, the panel in the instant case could have, and should have, elected to take the same route as *Rivera*. Because the government did not raise an

appeal or cross-appeal, Appellant's sentence should have been left alone. Had Appellant received a lesser sentence at the district court level, perhaps the district court's error would have offended the principles articulated in *United States v. Cotton*, 535 U.S. 625, *et. al.* However, given the magnitude of Appellant's sentence, and the practical implications of such a long sentence, the panel should not have exercised any discretion to address the error. *Id.* (citing *Johnson v. United States*, 520 U.S. at 467 and stating that "an appellate court may [then] exercise discretion to notice a forfeited error, *but only if* . . . the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings'").

While both sides have an interest in fair process and proceedings, Appellant suffers from this panel decision drastically more than the government and the judicial process benefits from it. The error was not raised by the government on appeal. The issue was therefore forfeited. The standard for reviewing the decision was not met given the circumstances of the instant case. Therefore, Appellant requests a hearing or rehearing before this Court en banc.

CONCLUSION

For the reasons advanced in the arguments above, Appellant Michael Greenlaw requests that the Eighth Circuit Court of Appeals hear this matter *en banc* to determine and review the panel decision in this case. The matter is of exceptional importance given the resulting drastic increase in Appellant's sentence, the absence of a government appeal or cross-appeal on this issue, and Appellant's belief that the

442 month sentence imposed by the district court was more than enough to insure the fairness, integrity, and public reputation of the judicial proceedings in the instant case.

Respectfully submitted,

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Dated: this 5th day of April, 2007

CERTIFICATE OF COMPLIANCE

The undersigned attorney for the Appellant certifies that this brief complies with the requirements set out in Fed. R. App. Proc. 32; 32(c)(2). Although 32(a)(7) does not apply to the filing of a petition for rehearing en banc, the undersigned attorney certifies that this petition is within the 15 page limit noted in Fed. R. App. Proc. 35(b)(2). The undersigned attorney also certifies that the brief was prepared using Microsoft Word and is in 14 point font. The undersigned attorney also certifies that the computer diskette containing the full text of the *Petition for Hearing or Rehearing En Banc* has been scanned for viruses and, to the best of our ability and technology, believes it to be virus free.

Respectfully submitted,

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Dated: this 5th day of April, 2007

APPENDIX J

[page 1]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
CR 03-107(4)

United States of America
. Plaintiff

vs. August 28, 2007
Minneapolis, MN
Michael Greenlaw . Courtroom 9W
. Defendant

TRANSCRIPT OF RESENTENCING HEARING
BEFORE THE HONORABLE JOAN ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:
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Reported By: Maria Weinbeck

Official Court Reporter
1005 U.S. Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415

Procedings reported by stenotype, transcript produced by computer-aided transcription.

[page 2]

THE COURT: Good morning. Please be seated. We're here this morning in the matter of United States versus Greenlaw. Counsel, would you identify yourselves for the record?

MR. STEINKAMP: Good morning, Your Honor. David Steinkamp for the government.

MR. BENSON: Kassius Benson for Mr. Greenlaw who is present.

THE COURT: Okay. Good morning. Mr. Benson, are you and your client ready to proceed?

MR. BENSON: Yes, Your Honor.

THE COURT: Why don't you come up, Mr. Greenlaw, to the podium with your lawyer. Mr. Steinkamp, I should hear from you first, I guess. Is there anything that you want to say?

MR. STEINKAMP: The only thing that I would say, Your Honor, is that I urge the Court to make similar findings as you did in your earlier sentence. That the

appropriate guideline range here would be 324 months to start with and credit for 62 months, as you indicated. And then resulting in a 262 month guideline sentence for each of the nonstatutory mandatory minimum counts.

And then to that, I would ask the Court to impose a five year sentence for Count 4, and a 25 year sentence for Count 10 consecutive to that guideline

[page 3]

sentence. Thank you, Your Honor.

THE COURT: Thank you. Mr. Benson?

MR. BENSON: Your Honor, I would ask this Court not to increase the sentence from what the Court imposed at the original sentencing date. Obviously, we are here because of the decision of the Eighth Circuit Court of Appeals. However, I would ask the Court to consider that the 442 months was both a significant and a substantial sentence. And I would ask the Court to adjust the guidelines which are advisory accordingly to basically to have the sentence remain the same.

I would note that the 442 month sentence at

this point would satisfy 18 U.S.C. Section 3553(a). It obviously points out the seriousness of the offense. It indicates respect for the law, and it's a just sentence given the situation that we're in right now. That is the just sentence.

I would also note that the 442 month sentence was something that the government did not appeal. Although, I will note that they noted at the original sentencing that they thought the 25 year might be appropriate. However, they chose not to appeal it. I can't speak to the reason for that, but I will just say that the 442 months is a significant sentence. And I believe that the Court, if it imposes the 25 year

[page 4]

consecutive to a lower guideline range, it will achieve the purpose of the Eighth Circuit opinion. But more importantly, the purposes of 18 U.S.C. Section 3553(a).

THE COURT: Thank you, Mr. Benson. Mr. Greenlaw, anything?

THE DEFENDANT: Well, Your Honor, a lot has changed since the last time I've been in front of you. I have gotten my GED. I work in the dish room. I'm

pursuing a UNICOR job, factory in Terre Haute FCI. I have not had any disciplinary reports since I've been incarcerated at BOP. My family been very supportive. And I ask you please do not impose this 15 years that the Eighth Circuit ordered you to. I'm very -- I'm just disturbed to be here in front of you today.

THE COURT: Well, as was very clear, I tried to give you every break and more that I could the first time around. And we're here on remand from the Eighth Circuit Court of Appeals. With respect to the nonconsecutive counts for which I determined that the range was 292 to 365, that actually constituted a lower range than the Eighth Circuit indicated in a footnote was the appropriate range. So I tried to do something for you there, too.

I gave you a sentence in the mid-point of that or started from that which as Mr. Steinkamp indicated

[page 5]

that's how that 324 months came to be. Then I gave you

credit, and out and out subtracted the 62 months that you did in State Court on basically the same charges. So the 262 was the right number for the nonconsecutive counts. Then Count 4 requires the mandatory consecutive 60. There's just not much to say on the subject except to go ahead and impose the sentence.

You are committed to the custody of the Bureau of Prisons for a period of 262 months on Count 1; 240 on each of Counts 2, 6, and 8; 36 months on Count 5, and that's all to be served concurrently.

On Count 4, there's a 60 month, that's consecutive. That's a mandatory.

And then on Count 10, 300 months to be served consecutively to the terms imposed on Counts 1, 2, 4, 5, 6, and 8. That comes to a total of 622 months.

The remainder of the sentence remains the same. I won't go through the supervised release terms and conditions. They are as were previously imposed. There is no fine.

I did calculate your probable release for what it's worth. I figured out that you are about 364 months old now. And if you do 85 percent of the 622,

that's 528, and I have you getting out of prison with still some life ahead of you. Not as much as we thought

[page 6]

before, but it's not a life sentence. And I commend you for what you are doing in the institution. It seems to me I recommended a different institution. Didn't I recommend Oxford for you, but you are in Terre Haute?

THE DEFENDANT: I was sent to Big Sandy USP.

THE COURT: Okay. Well, that's everything. Thank you, Mr. Benson. Thank you, Mr. Steinkamp. Good luck to you, Mr. Greenlaw. We're in recess.

(End of proceedings.)

***

-0 0 0-

I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: September 5, 2007

/s/ Maria Weinbeck

Court Reporter

APPENDIX K

UNITED STATES DISTRICT COURT
District of Minnesota

UNITED STATES OF AMERICA	RE-SENTENCING JUDGMENT IN A CRIMINAL CASE PURSUANT TO REMAND
v.	Case Number: 03CR107(4) (JNE/SRN)
MICHAEL GREENLAW	USM Number: 11255-041 Social Security Number: 9017 Date of Birth: 1977
	KASSIUS O. BENSON Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s): .
[ ] pleaded nolo contendere to count(s) which was accepted by the court.
[x] was found guilty on count(s) 1, 2, 4, 5, 6, 8, 10 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(1); (b)(1)(A);846	Conspiracy to Distribute & Possess with Intent to Distribute in Excess of 50 Grams of Cocaine Base and 5,000 Grams of Cocaine	11-16-04	1
18:924(o)	Conspiracy to Possess and Brandish Firearms During and in Relation to a Drug Trafficking Crime	11-16-04	2
18:924(c)(1)& 2	Carrying a Firearm in Relation to a Crime of Violence	9-11-98	4
18:1959(a)(6)	Conspiracy to Assault with a Dangerous Weapon	09-11-98	5
18:1959(a)(3) &2	Assault with a Dangerous Weapon	10-07-98	6
18:1959(a)(3) &2	Assault with a Dangerous Weapon	06-15-99	8
18:924(c)(1) &2	Carrying, Brandishing, and	06-15-99	10

Discharging a
Firearm in Relation
to a Crime of
Violence

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[x] The defendant has been found not guilty on counts 9.

[ ] Count(s) (is)(are) dismissed on the motion of the United States.

Special Assessment of $700.00

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material change in economic circumstances.

August 28, 2007
Date of Imposition
of Judgment

s/ Joan N. Ericksen
Signature of Judge

JOAN N. ERICKSEN,
United States District Judge
Name & Title of Judge

August 28, 2007
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of six-hundred-twenty-two (622) months. This term consists of 262 months on Count 1; 240 months on each of Counts 2, 6, and 8; and 36 months on Count 5, all to be served concurrently; and sixty (60) months on Count 4, to be served consecutively to the terms imposed on Counts 1, 2, 5, 6, and 8; and three-hundred (300) months on Count 10, to be served consecutively to the terms imposed on Counts 1, 2, 4, 5, 6, and 8..

[x] The court makes the following recommendations to the Bureau of Prisons:
Court recommends incarceration in a facility as close to the State of Minnesota as possible.

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at on .
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] before on .

[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on_____to_____ a_____, with a certified copy of this judgment.

_____
United States Marshal

By_____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years. This term consists of 5 years on each of Counts 1, 4, and 10; 3 years on each of Counts 2, 6, and 8; and 1 year on Count 5, all such terms to be run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[ ] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[x] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this Judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any

controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

a The defendant shall not commit any crimes, federal, state, or local.

b The defendant shall abide by the standard conditions of supervised release recommended by the Sentencing Commission.

c The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.

d The defendant shall participate in a program for drug and alcohol abuse at the direction of the probation officer. That program may include testing and inpatient or outpatient treatment, counseling or a support group. Further, the defendant shall contribute to the costs of such treatment as determined by the Probation Office Co-Payment Program not to exceed the total cost of treatment.

e The defendant shall undergo mandatory drug testing as set forth by 18 U.S.C. §§ 3563(a) and 3583(d).

f The defendant shall not associate with any member, prospect, or associate member of the "Family Mob Gang", or any other gang. If the defendant is found to be in the company of such individuals while wearing the clothing, colors, or insignia of the "Family Mob Gang" or any other gang, the Court will presume that this

association was for the purpose of participating in gang activities.

g The defendant shall cooperate in the collection of DNA as approved by the probation officer and mandated pursuant to 18 U.S.C. §§ 3563(a) and 3583(d).

h The defendant shall participate in educational programming, as approved by the probation officer, to obtain a high school diploma or General Equivalency Diploma.

PETITIONER'S BRIEF

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No. 07-330

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IN THE

Supreme Court of the United States

MICHAEL J. GREENLAW,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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QUESTION PRESENTED

Whether a federal court of appeals may increase a criminal defendant's sentence *sua sponte* and in the absence of a cross-appeal by the Government.

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BRIEF FOR THE PETITIONER

Petitioner Michael J. Greenlaw respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a) is published at 481 F.3d 601.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2007. Pet. App. 1a. On April 24, 2007, the Eighth Circuit granted petitioner leave to file an out-of-time petition for rehearing and rehearing en banc, *id.* at 27a, which was denied on May 10, 2007, *id.* at 28a. On July 27, 2007, Justice Alito extended the time to file the petition for certiorari until September 7, 2007. *See* App. No. 07A80. This Court granted certiorari on January 4, 2008. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 3742(b) of Title 18 provides in relevant part:

> (b) APPEAL BY THE GOVERNMENT.--The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

STATEMENT

1. Petitioner, along with seven others, was arrested and accused of being a member of a street gang that sold crack cocaine on the south side of Minneapolis. Pet. App. 2a-4a. Six of those arrested pled guilty, while petitioner and a co-defendant stood trial on various drug and gun-related charges. After a two-week jury trial, petitioner was convicted of conspiracy to distribute in excess of fifty grams of crack cocaine (Count 1), conspiracy to possess firearms in relation to a drug trafficking crime (Count 2), carrying a firearm in relation to a drug trafficking crime (Count 4), conspiracy to assault

with a dangerous weapon (Count 5), two counts of assault with a dangerous weapon (Counts 6 and 8), and carrying a firearm during a crime of violence (Count 10). Pet. App. 4a, 7a-8a.[1]

The court sentenced petitioner to a total of 262 months for the drug and conspiracy counts. Pet. App. 7a-8a. With respect to the gun counts, the Government argued that under 18 U.S.C. § 924(c), petitioner should be sentenced to a mandatory minimum sentence of five years for the first gun offense (Count 4), and an additional consecutive term of twenty-five years for the second (Count 10) because the second count constituted a "second or subsequent conviction" within the meaning of 18 U.S.C. § 924(c)(1)(C).[2] The trial court rejected that request, concluding that Count 10 was not a second or subsequent conviction "because Greenlaw was only 'convicted' at the entry of judgment of conviction." Pet. App. 8a. Accordingly, the court sentenced petitioner to five years for the first weapons charge and ten years for the second, to be served consecutively to each other and to the 262-month sentence for the drug and conspiracy counts. *Id.* Thus, in all, the court sentenced petitioner to 442 months' imprisonment. *Id.* at 2a.

---

[1] Petitioner was acquitted of an additional charge of carrying a firearm during a drug trafficking crime. Pet. App. 4a.

[2] That provision mandates that "[i]n the case of a second or subsequent conviction under this subsection, the person shall . . . be sentenced to a term of imprisonment of not less than 25 years." Section 924(c)(1)(D)(ii) further provides that "no term of imprisonment on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person."

2. Although the district court rejected the Government's view of the mandatory minimum sentence required under Section 924(c), the Government did not exercise its right to appeal petitioner's sentence. *See* 18 U.S.C. § 3742(b)(1). Nor did it file a cross-appeal when petitioner filed his own notice of appeal challenging his sentence and conviction. *See* Pet. App. 9a. Moreover, in responding to petitioner's challenge to his sentence in the Eighth Circuit, the Government did not urge the court of appeals to review the application of Section 924(c). *See id.* Instead, the Government simply noted, in passing, that "[a]lthough 18 U.S.C. § 924(c) required a 5-year sentence on Count 4 (consecutive to the 262 month guideline sentence), and a 25-year sentence, consecutive to the previously imposed sentences, the court gave the defendant 5 years consecutive for Count 4 and 10 years consecutive for Count 10, resulting in a total sentence of 442 months rather than 662 months." J.A. 85. The conclusion that the Government drew from this observation was not that petitioner's sentence should be increased, but rather that the "district court's sentence was not unreasonable." *Id.* at 86.

The court of appeals agreed with the Government that petitioner's sentence was not unreasonable, and accordingly rejected that, and every other, objection petitioner raised against his conviction and sentence. But rather than affirming the district court's decision, the Eighth Circuit *sua sponte* vacated petitioner's sentence and remanded with instructions to increase petitioner's sentence by fifteen years because it concluded that the district court had erred in declining to apply the twenty-five-year mandatory minimum sentence for "second and subsequent" gun

convictions under Section 924(c)(1)(C). Pet. App. 8a-10a, 15a. The court acknowledged that the Government "did not appeal the issue." *Id.* at 9a. Nonetheless, it concluded that:

> Because this error seriously affects substantial rights and the fairness, integrity, and public reputation of judicial proceedings, and because we think it is judicially efficient for us to address the error, we exercise our discretion under Fed. R. Crim. P. 52(b) and find the district court plainly erred in excluding the statutory mandatory sentence under Count 10.

Id. at 9a-10a (footnote omitted).

On April 24, 2007, the Eighth Circuit granted petitioner leave to file an out-of-time petition for rehearing and rehearing en banc. Pet. App. 27a. Petitioner argued in his petition that the Eighth Circuit should not have vacated his sentence and remanded the case for resentencing because the Government had failed to appeal or cross-appeal the sentence. J.A. 95-96. The petition was denied on May 10, 2007. Pet. App. 28a.

3. On August 28, 2007, the district court resentenced petitioner, imposing a 25-year consecutive sentence for Count 10. J.A. 109. Petitioner's total sentence thus became 662 months of imprisonment. *Id.*

4. On September 7, 2007, petitioner filed a petition for certiorari with this Court, challenging the court of appeals' authority to increase his sentence in the absence of a Government cross-appeal. In response, the Government confessed error, "agree[ing] with petitioner that the court of appeals

erred in *sua sponte* remanding the case with directions to enhance petitioner's sentence." U.S. Br. 12.

5. The Court subsequently granted the writ of certiorari and appointed an amicus to defend the court of appeals' judgment.

SUMMARY OF THE ARGUMENT

There are few rules of appellate practice more firmly established than the principle that a non-appealing party "may not attack the [lower court] decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924). This principle is a necessary consequence of the equally established requirement that a party seeking revision of a judgment in its favor must file its own timely notice of appeal or cross-appeal. As a result, in the absence of a cross-appeal, a federal court of appeals lacks any authority to alter a district court's judgment in a non-appealing party's favor, either at that party's request or on the court's own initiative.

This rule is particularly appropriate in sentencing appeals. For most of the nation's history, the Government was not permitted to appeal a criminal sentence. When that authority was finally granted in 1984, Congress acted to ensure that such appeals would be rare, requiring express authorization from the Attorney General or the Solicitor General. Strict adherence to the traditional cross-appeal requirement is necessary to give effect to

that requirement and to maintain the allocation of authority between courts and prosecutors, as well as lines of authority within the Executive Branch, as ordained by Congress.

There is no room for an exception for plain sentencing errors. First, no exception is possible because the statutory requirement of a Government appeal in sentencing cases is jurisdictional. While there has been some disagreement on the Court as to the jurisdictional status of *time limits* for filing a notice of appeal, none has questioned that a court of appeals lacks jurisdiction if no notice of appeal is filed at all. The failure to file a cross-appeal equally deprives a court of appeals of jurisdiction to provide relief to a non-appealing party.

Second, even if the cross-appeal requirement is not strictly jurisdictional, it is nonetheless exceedingly strict. This Court has never recognized an exception to the rule, and none is warranted here. While permitting correction of plain errors might marginally advance a general interest in correct application of sentencing laws, that interest is overwhelmed by the broader institutional interests in regularizing the appeals process, providing parties fair notice of the scope of the appeal, and fostering both repose and compliance with important rules embodied in the Federal Rules of Appellate Procedure and, in this case, the federal sentencing appeals statute.

Finally, even if Federal Rule of Criminal Procedure 52(b) permitted a court of appeals to correct an unlawfully low sentence in the absence of a Government cross-appeal in cases of plain error, that rule has no application to this case. The rule does not

apply to errors injuring only the prosecutorial interests of the Government, rather than that substantial rights of the defendant. And even if it did, declining to correct a sentencing error that the Government did not appeal, where the defendant has already been given a lengthy sentence, does not seriously affect the fairness, integrity or public reputation of the judicial proceedings.

ARGUMENT

I. A Court May Not Increase A Criminal Defendant's Sentence In The Absence Of A Government Appeal Or Cross-Appeal.

For more than two centuries, this Court's decisions have established that a party to a federal case who has not taken an appeal "may not attack the [lower court] decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924). *See, e.g., McDonough v. Dannery*, 3 U.S. (3 Dall.) 188, 198, (1796). The rule enforces the basic requirement that those who seek modification of a judgment must file their own timely notice of appeal or cross-appeal as required by rule and statute. In this case, the Government's decision not to appeal petitioner's sentence deprived the court of appeals of any authority to enlarge that sentence, regardless of the court's view of the merits of the lower court's sentencing decision.

A. The General Rule Against Granting Relief To A Non-Appealing Party Is Inveterate And Certain.

1. As early as 1796, this Court recognized as unexceptional the rule that an appellate court cannot grant relief to an appellee absent a cross-appeal. In *McDonough v. Dannery*, 3 U.S. 188, the Court entertained competing claims to a British ship captured, but then abandoned, by the French navy. Over the French captors' objection, the district court awarded one-third of the ship's value to its American salvagers, with the remainder to its British owners. *The Mary Ford*, 16 F. Cas. 981, 984 (D. Mass. 1796). The French appealed to the circuit court, which reversed and awarded the remainder to the French. *Id.* at 985. When the British owners sought review in this Court, neither the Americans nor the French filed a cross-appeal seeking a greater share than was awarded below. As a result, although this Court questioned whether "the whole property ought not to have been decreed to the American libellants, or, at least, a greater portion of it, by way of salvage," *McDonough*, 3 U.S. at 198, it concluded that it lacked the power to revise the judgment in the non-appealing parties' favor. Because the Americans had "not appealed from the decision of the inferior court," the Court explained, "we cannot now take notice of their interest in the cause." *Id.*

Over the ensuing two hundred years, this Court has repeatedly applied the rule in a variety of contexts, describing the principle as "settled" law as early as 1864. *See, e.g.*, *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 480 (1999) (noting the Court's "more than two centuries of repeatedly

endorsing the cross-appeal requirement"); *The William Bagaley*, 72 U.S. (5 Wall.) 377, 412 (1867) ("Settled rule in this court is that no one but an appellant in such a case can be heard for the reversal of a decree in the subordinate court."); *Chittenden v. Brewster*, 69 U.S. (2 Wall.) 191, 196 (1865) (stating that "the rule is settled in the appellate court, that a party not appealing cannot take advantage of an error in the decree committed against himself").[3]

The continuing validity of the rule has never been questioned. To the contrary, by 1927, the Court referred to this principle as "so well settled that citation is not necessary." *Fed. Trade Comm'n v. Pac. States Paper Trade Ass'n*, 273 U.S. 52, 66 (1927). Seventy years ago, the Court described the cross-appeal requirement as "inveterate and certain." *Morley Constr. Co. v. Md. Cas. Co.*, 300 U.S. 185, 191 (1937). And this Court applied the rule to preclude a court from expanding a judgment in favor of non-

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[3] *See also Union Tool Co. v. Wilson*, 259 U.S. 107, 111 (1922) (applying rule in patent infringement case); *Landram v. Jordan*, 203 U.S. 56, 62 (1906) (challenge to will); *Bolles v. Outing Co.*, 175 U.S. 262, 268 (1899) (copyright infringement); *Loudon v. Taxing Dist.*, 104 U.S. 771, 774 (1882) (public contracts); *Clark v. Killian*, 103 U.S. 766, 769 (1881) (real estate conveyances). The Court also continued to apply the rule in cases of admiralty and salvage. *See, e.g.*, *The Stephen Morgan*, 94 U.S. 599, 604 (1877); *The Maria Martin*, 79 U.S. (12 Wall.) 31, 40-41 (1871); *The Quickstep*, 76 U.S. (9 Wall.) 665, 672 (1870); *Stratton v. Jarvis & Brown*, 33 U.S. (8 Pet.) 4, 9-10 (1834); *Canter v. Am. & Ocean Ins. Cos.*, 28 U.S. (3 Pet.) 307, 318 (1830). As discussed *infra* at 13-15, the applicability of the rule to criminal appeals did not arise in early cases because during this time period, neither defendants nor the Government had any right to appeal a criminal conviction or sentence. *See Carroll v. United States*, 354 U.S. 394, 400-02 (1957).

appealing parties *sua sponte* as recently as 1999. *See Neztsosie*, 526 U.S. at 479.[4]

2. The Court has never deviated from the cross-appeal requirement, even in the case of very clear error. "Indeed," the Court noted in *Neztsosie*, "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule." 526 U.S. at 480.

Thus, in *Mail Co. v. Flanders*, 79 U.S. (12 Wall.) 130 (1870), for example, this Court concluded that it lacked the authority to vacate a judgment entered against a non-appealing party, even though it was absolutely clear that the district court erred in entering its order. The case arose when the United States seized two steamboats pursuant to the Civil War-era Abandoned or Captured Property Act. The owner of the boats sued in federal district court to enjoin their sale. The district court enjoined the sale of one of the boats, restoring it to the owner, but concluded that it lacked jurisdiction with respect to the second boat. *Id.* at 131, 134. The owner then appealed to this Court, challenging the district court's refusal to restore the second boat as well. Upon review, this Court affirmed, concluding that because "[b]oth parties . . . are citizens of the same State . . . the bill of complaint was properly dismissed for want of jurisdiction." *Id.* at 135. The Court recognized

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[4] Although often stated in terms of a limitation on the arguments that a non-appealing party may raise on appeal, *see, e.g.*, *Am. Ry. Express Co.*, 265 U.S. at 435, the decision in *Neztsosie* makes clear that the rule equally prevents a court of appeals from expanding a judgment in a non-appealing party's favor on its own initiative.

that this holding applied equally to the district court's award of the first boat to the appellant. It explained that "[m]uch difficulty, to say the least, would have arisen in sustaining that part of the decree." *Id.* at 134. But because the defendants had failed to file a cross-appeal, this Court held that "the error, if it be one, cannot be corrected. Correction of the error is not sought by the appellants, and it is well-settled that no one but an appellant can be heard in an appellate court for the reversal of a decree rendered in the subordinate court." *Id.* at 135.

Likewise, in *Chittenden v. Brewster*, 69 U.S. (2 Wall.) 191 (1864), this Court rejected an attempt by defendants-appellees to raise an obvious error in the trial court's judgment when only the plaintiffs had appealed from a partially favorable judgment below. The appellees argued that the plaintiffs – who were suing to set aside an assignment allegedly undertaken to avoid collection on a judgment – had failed to prove that "executions had been issued, and returned unsatisfied" and asserted that "this defect is fatal to the right of the complainants to maintain their bill." *Id.* at 195. This Court agreed, but found the claim barred by the absence of a cross-appeal: "This would be so, if the appellees, against whom the decree was rendered, had appealed from the same . . . . But here the complainants only have appealed, and the rule is settled in the appellate court, that a party not appealing cannot take advantage of an error in the decree committed against himself . . . ." *Id.* at 195-96.

In subsequent decisions, the Court often has not even considered whether a non-appealed error was plain or obvious, relying instead on the established

rule that *all* errors are beyond correction unless the affected party has taken an appeal. *See, e.g.*, *Bolles v. Outing Co.*, 175 U.S. 262, 268 (1899) (finding it "sufficient to say" that, irrespective of defendant's potential claims, "the defendant did not take out a writ of error, and cannot now be heard to complain of any adverse rulings in the court below"); *Alexander v. Cosden Pipe Line Co.*, 290 U.S. 484, 487 (1934) (finding it "advisable to point out at the outset that we have no occasion to re-examine" the non-appealed portions of the lower court judgment); *Loudon v. Taxing Dist.*, 104 U.S. 771, 774 (1882) (finding it "unnecessary to determine what might have been done in this case" if the appellee had preserved a cross-appeal).

B. The Cross-Appeal Requirement Is Especially Appropriate In The Sentencing Context.

Strict application of the traditional cross-appeal requirement is especially appropriate in the context of sentencing appeals, where the authority of the Government to seek correction of an erroneous sentencing has long been narrowly construed and presently is governed by strict statutory limitations that the cross-appeal requirement serves to enforce.

1. Since the birth of the federal judicial system, courts have treated "appeals by the Government in criminal cases [as] something unusual, exceptional, not favored." *Carroll v. United States*, 354 U.S. 394, 400 (1957). "The history shows resistance of the Court to the opening of an appellate route for the Government until it was plainly provided by the Congress, and after that a close restriction of its uses

to those authorized by the statute." *Id.* *See also* *United States v. Wilson*, 420 U.S. 332, 336 (1975); *United States v. Sanges*, 144 U.S. 310, 318-19, 323 (1892).

As a result, through most of the nation's history, appellate courts have lacked the authority to correct an unduly lenient sentence, either *sua sponte* or even at the behest of the Government. For the first half of that history, appeals in federal criminal sentences by either party were rare. "Indeed, it was 100 years before the *defendant* in a criminal case, even a capital case, was afforded appellate review as of right." *Carroll*, 354 U.S. at 400 (emphasis in original). The Government was not permitted to seek appellate review in criminal cases at all until 1907, when Congress allowed the United States to file writs of error in limited circumstances involving indictments and special pleas in bar. *See id.* at 401-02; Act of Mar. 2, 1907, ch. 2564, Pub. L. No. 59-223, 34 Stat. 1246, 1246 (1907).

Even then, however, the Government was not permitted to appeal an unduly lenient sentence. It was not until 1970 that Congress first gave the Government a limited right to appeal criminal sentences in a small category of cases arising under "dangerous special offender" and "dangerous special drug offender" provisions.[5] And it was not until 1984 that Congress extended that authority to all

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[5] *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 3576, 84 Stat. 922, 950-51 (1970) (repealed 1984); Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 409(h), 84 Stat. 1236, 1268-69 (1970) (codified as amended in various sections of title 21 of the U.S. Code).

categories of criminal sentences in the Comprehensive Crime Control Act of 1984 (CCCA), Pub. L. No. 98-473, § 213(a), 98 Stat. 1837, 2011-12 (1985). *See generally* 15B Charles Alan Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 3919.8.

Although it authorized Government sentencing appeals, the CCCA placed important restrictions on the Government's right to seek – and therefore, necessarily, upon the appellate courts' authority to grant – correction of an erroneous criminal sentence. Most significantly, to "assure that . . . appeals are not routinely filed for every sentence below the guidelines,"[6] Congress prohibited the Government from prosecuting any sentencing appeal unless "the Attorney General or the Solicitor General personally approves the filing of the notice of appeal." Pub. L. No. 98-473, § 213(a), 98 Stat. 1837, 2012 (1985) (codified as amended at 18 U.S.C. § 3742(b)).[7]

2. In light of this history and the statutory restrictions of the CCCA, strict enforcement of the traditional cross-appeal requirement is especially appropriate.

First, in drafting the CCCA, Congress expressly considered, and rejected, the proposal that a court of appeals be "authorized to augment (as well as diminish) [a] sentence" based on an appeal by the

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[6] S. Rep. No. 98-225, at 154 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3337.

[7] The Attorney General has assigned responsibility for authorizing sentencing appeals to the Solicitor General. *See* 28 C.F.R. § 0.20(b) (2007). The statute was amended in 1990 to permit a deputy solicitor general designated by the Solicitor General to provide approval as well. *See* Crime Control Act of 1990, Pub. L. No. 101-647, § 3501, 104 Stat. 4789, 4921 (1990).

defendant alone. S. Rep. No. 98-225, at 151 n.370 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3334. That proposal, the Senate Report explained, would do little to solve the problem of unduly lenient sentences "since it is unlikely that a defendant would choose to appeal, on the basis of alleged excessiveness, a sentence deemed by the reviewing court as so inadequate as to warrant enhancement." *Id.* At the same time, the Report concluded, such a system would place "an undesirable strain on the defendant's right to seek sentence review." *Id.*

Instead, Congress responded to the perceived need to correct unduly lenient sentences by empowering high-level Department of Justice officials to authorize Government sentencing appeals in appropriate cases. S. Rep. No. 98-225, at 151, 154. In making that decision, Congress understood and ratified the long-standing rule that without such an appeal, the courts would be precluded from expanding the judgment in favor of the Government. The Senate Report explained that "[i]f only the defendant could appeal his sentence, there would be no effective opportunity for the reviewing courts to correct the injustice arising from a sentence that was patently too lenient." *Id.* at 151. Thus, authorizing Government appeals was desirable because without it, "the appellate court could reduce excessive sentences *but not raise inadequate ones*." *Id.* at 65 (emphasis added).[8]

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[8] The legislative history of the Organized Crime Control Act of 1970, which authorized Government sentencing appeals in "dangerous special offender" cases, expressed the same understanding. The House Report explained that "a sentence may be made more severe only on review taken by the

Even without such on-point legislative history, this Court has long presumed that Congress is aware of the legal background against which it legislates. *See, e.g.*, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-99 (1979). As discussed above, at the time Congress enacted the CCCA, that background included the traditional cross-appeal requirement and this Court's historical practice of strictly construing the scope of appellate review of criminal sentences at the behest of the Government. There is nothing in the statute's text or history that indicates any congressional intent to deviate from established appellate practice in the context of sentencing appeals.

Second, allowing a court of appeals to correct a criminal sentence in the absence of a Government appeal authorized by the Solicitor General would vitiate the authorization requirement.

In permitting Government sentencing appeals in the CCCA, Congress was understandably concerned that the new power be exercised sparingly, lest the federal courts be inundated by sentencing appeals.[9] S. Rep. No. 98-225, at 154. Congress responded by

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Government and after hearing. Failure of the Government to take a review of the original sentence precludes any later imposition of a sentence more severe than that originally imposed." H.R. Rep. No. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4039-40.

[9] The burden of deciding sentencing appeals, even without significant numbers of appeals by the Government, is substantial. In 2006, there were over 8,000 sentencing appeals by defendants. U.S. Sentencing Comm'n, 2006 ANNUAL REPORT, ch. 5, at 44, *available at* http://www.ussc.gov/ANNRPT/2006/ar06toc.htm.

allowing appeals only upon authorization by the Attorney General or Solicitor General, a restriction Congress surely knew would leave many unlawful sentences uncorrected, as there would be many instances in which those officials would decline to authorize an appeal. As this Court has recognized, while a "private litigant . . . generally does not forgo an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the Government and the crowded dockets of the courts, before authorizing an appeal." *United States v. Mendoza*, 464 U.S. 154, 161 (1984). The Solicitor General plays the same role at the certiorari stage, where this Court "relies on the Solicitor General to exercise such independent judgment and to decline to authorize petitions for review in this Court in the majority of the cases the Government has lost." *United States v. Providence Journal Co.*, 485 U.S. 693, 702 n.7 (1988).

Allowing courts of appeals nonetheless to revise a criminal sentence in the Government's favor without an appeal authorized by the Solicitor General would not only undermine the purposes of the requirement – redirecting more judicial resources to the review of sentencing issues than Congress intended – but would also pose grave separation of powers concerns. Under the regime established by Congress, the "Executive Branch . . . controls the progress of Government litigation through the federal courts." *Mendoza*, 464 U.S. at 161. Congress placed the authority to seek correction of a criminal sentence – and, concomitantly, the authority to forgo that correction – squarely in the hands of the Executive, not the Judiciary. It is no more appropriate for a court to overrule the Government's decision to

abstain from taking an appeal than it is for a court to second-guess a prosecutor's decision to forgo charging a defendant with an applicable offense or to withdraw an indictment. *See, e.g.*, *United States v. Goodwin*, 457 U.S. 368, 380 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1869).

At the same time, strict adherence to the cross-appeal requirement is necessary to ensure the appropriate division of authority *within* the executive branch. The Eighth Circuit's decision creates an opportunity for line-level subordinates denied permission to appeal to nonetheless effectively seek review upon a defendant's appeal, by subtly (or not so subtly) suggesting that the sentence is erroneous and should be corrected *sua sponte*.

Third, as Congress recognized, a system of review permitting an increased sentence any time a defendant files an appeal would place an "undesirable strain" on a defendant's right to appeal his conviction and sentence. *See* S. Rep. No. 98-225, at 151 n.370. When the cross-appeal requirement is enforced, a defendant may appeal his conviction or sentence without fear that doing so will substantially increase the likelihood that the appeal will result in a higher sentence. To be sure, the Government may appeal or cross-appeal the sentence, but the likelihood that it will do so is remote[10] and, more importantly, is not affected by the defendant's decision to appeal. Under

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[10] In 2006, the Government chose to appeal a sentence in only 0.3% of criminal cases. *See* U.S. Sentencing Comm'n, 2006 ANNUAL REPORT, ch. 5, at 31-32, 44, *available at* http://www.ussc.gov/ANNRPT/2006/ar06toc.htm (finding 212 known Government appeals out of 72,585 sentencings in 2006).

the rule of the Eighth Circuit, however, a defendant's decision to take an appeal is now fraught with peril, as doing so will expose the defendant's sentence to increase at the initiative of the appellate panel even if the Government does not cross-appeal. It was precisely to avoid this effect that Congress rejected the proposal that would have permitted courts to correct an unduly lenient sentence in the course of deciding a defendant's appeal, opting instead to provide a separate avenue for such correction through an authorized appeal by the Government. *Id.*

II. There Is No Basis For An Exception To The Cross-Appeal Requirement In Cases Of Plain Error.

Although the Eighth Circuit was aware that other courts have declined to correct an unlawfully low sentence unless the Government has appealed, it nonetheless concluded that it could, and should, enlarge petitioner's sentence in the absence of an authorized cross-appeal because it believed that petitioner's sentence was plainly erroneous within the meaning of Federal Rule of Criminal Procedure 52(b). Pet. App. 9a-10a. That conclusion itself was plainly wrong. The rule prohibiting a court from enlarging a judgment in favor of a non-appealing party is not subject to exception and, even if it were, no exception would be warranted here.

A. The Cross-Appeal Requirement Is Jurisdictional.

The traditional cross-appeal requirement admits of no exception first and foremost because it enforces a limitation on the appellate jurisdiction of the circuit courts. *See Bowles v. Russell*, 127 S. Ct. 2360, 2366

(2007) (noting that "this Court has no authority to create equitable exceptions to jurisdictional requirements"); *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992) (noting that federal rules of procedure – like "plain error" rule, Fed. R. Crim. P. 52(b) – cannot "extend or restrict the jurisdiction conferred by a statute").

1. This Court has described and enforced the cross-appeal requirement in a manner consistent with its jurisdictional status. In *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937), Justice Cardozo described the rule as affecting "[*t*]*he power* of an appellate court to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal." *Id.* at 187 (emphasis added). Other cases likewise expressed the cross-appeal requirement in absolute, jurisdictional terms. *See, e.g.*, *McDonough v. Dannery*, 3 U.S. 188, 198, 3 Dall. 149, 158 (1796) (noting that "as they have not appealed . . . we *cannot* now take notice of their interest in the cause") (emphasis added); *Mail Co. v. Flanders*, 79 U.S. (12 Wall.) 130, 135 (1870) (stating that "inasmuch as that part of the decree was in favor of the appellants, and the respondents did not appeal, the error, if it be one, *cannot* be corrected") (emphasis added); *Union Tool Co. v. Wilson*, 259 U.S. 107, 111 (1922) (filing of a cross-appeal "enabled" the court to review that part of the order alleged to be erroneous); *Swarb v. Lennox*, 405 U.S. 191, 202 (1972) (White, J., concurring) ("It is true that this Court has no jurisdiction of that portion of the District Court's judgment from which no appeal or cross-appeal was taken.").

In addition, this Court has *applied* the cross-appeal rule as if it were jurisdictional. The Court has enforced the rule without exception for more than twenty decades. *See Neztsosie*, 526 U.S. at 480. Indeed, none of the early cross-appeal cases so much as mentioned the possibility of an exception to the rule.[11] The absence of such exceptions is the hallmark of a jurisdictional rule. *See Bowles*, 127 S. Ct. at 2366.

2. This Court's long-standing treatment of the cross-appeal requirement as jurisdictional is also consistent with the Court's insistence that other closely-related appeal requirements restrict the circuit courts' appellate jurisdiction.

"[I]t is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." *Id.* at 2363 n.2. *See also, e.g., The S.S. Osborne*, 105 U.S. 447, 450 (1882). While members of this Court have disagreed whether some *time limits* for taking appeals are appropriately considered jurisdictional,[12] none has questioned the much more basic proposition that jurisdiction fails when the complaining party has failed to file *any notice of appeal at all.* "The filing of a notice of appeal is an event of jurisdictional

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[11] *See, e.g., Loudon v. Taxing Dist.*, 104 U.S. 771, 774 (1882) ("An appeal brings up for review only that which was decided adversely to the appellant."); *Alexander v. Cosden Pipe Line Co.*, 290 U.S. 484, 488 (1934) (noting that in the absence of a cross-appeal by appellees, "it should be understood that the merits of the [claims decided in favor of appellant below] are not here under consideration").

[12] *See, e.g., Bowles*, 127 S. Ct. at 2367 (Souter, J., dissenting).

significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam). *See also, e.g., Credit Co. v. Ark. Cent. Ry. Co.*, 128 U.S. 258, 260-61 (1888). Thus, "if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act." *Griggs*, 459 U.S. at 61.

For a time, some courts took the view that so long as *some party* filed a notice of appeal, the court of appeals had jurisdiction over the case as a whole and any limitation on the scope of relief – including the bar against expanding the judgment in favor of a non-appealing party – was a non-jurisdictional "rule of practice" subject to exception in appropriate cases. *See, e.g., Bryant v. Technical Research Co.*, 654 F.2d 1337, 1341-43 (9th Cir. 1981); *Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 476-77 (8th Cir. 1977).

That view is incompatible with this Court's subsequent decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988).[13] In that case, sixteen plaintiffs filed an employment discrimination suit against their employer. The district court dismissed the action for failure to state a claim. The lawyer who prepared the notice of appeal on behalf of all the plaintiffs inadvertently omitted the name of one of his clients, Jose Torres. The error apparently went unnoticed in the court of appeals, where the plaintiffs prevailed. On remand, the error was discovered and

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[13] *See, e.g., Browning v. Navarro*, 894 F.2d 99, 100 (5th Cir. 1990) (recognizing conflict); *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408, 1415-16 (7th Cir. 1989) (same).

the district court entered summary judgment against Torres, holding that the prior dismissal order was final as to him because he had failed to take an effective appeal. This Court upheld the dismissal. *Id.* at 314. "The failure to name a party in a notice of appeal," the Court held, "constitutes a failure of that party to appeal." *Id.* As a result, "the Court of Appeals was correct that it never had jurisdiction over petitioner's appeal." *Id.* at 317. *See also id.* at 314 (noting that petitioner's failure presented "a jurisdictional bar to the appeal").

Importantly, it made no difference in *Torres* that the *case* was properly before the court of appeals on the basis of another party's timely notice of appeal. The petitioner's failure to appeal nonetheless deprived the court of jurisdiction to alter the district court's judgment in his favor. Moreover, it made no difference that the error may have been plain, or that the court of appeals was able to correct it with respect to Torres without expending any additional resources. The rule was jurisdictional and, therefore, not subject to exception under any circumstance.

3. Finally, the conclusion that the cross-appeal requirement is jurisdictional in criminal sentencing cases is strengthened by the fact that it arises from, and enforces, a statutory requirement. *See* 18 U.S.C. § 3742(b). In recent decisions considering the timing of appeals, this Court has ascribed "jurisdictional significance [to] the fact that a time limit is set forth in a statute." *Bowles*, 127 S. Ct. at 2363 n.2. While this case does not involve the timeliness of an

appeal,[14] the cross-appeal requirement nonetheless arises from a statute, 18 U.S.C. § 3742(b). By requiring the Government to file a notice of appeal to challenge a sentence and mandating that such appeals be authorized, Section 3742(b) describes the "classes of cases" falling within a court's adjudicatory authority, no less so than the statutory provisions setting time limits for filing required notices of appeal in a civil case. *See Bowles*, 127 S. Ct. at 2365-66; *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

B. Even If The Cross-Appeal Requirement Is Not Jurisdictional, No Exception Is Permitted To Correct Plain Errors.

In *Neztsosie*, this Court recognized that some courts have taken the view "that the prohibition on modifying judgments in favor of a nonappealing party is a 'rule of practice,' subject to exceptions, not an unqualified limit on the power of appellate courts." 526 U.S. at 480. The Court concluded that it "need not decide the theoretical status of such a firmly entrenched rule, however, for even if it is not strictly jurisdictional," there was no basis for an exception in the case before it. *Id.* The same is true here. Even if

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[14] This Court has never suggested that statutory codification is critical to the jurisdictional status of the more general requirement that an appealing party must file a notice of appeal to trigger the court of appeals' jurisdiction. *See Bowles*, 127 S. Ct. at 2363 n.2. (noting jurisdictional significance of "the fact that a *time limit* is set forth in a statute") (emphasis added). For example, while the Court has held that the time for seeking certiorari in a criminal case is not jurisdictional because the time limit is not set forth in any statute, *id.* at 2365, it has never intimated that the Court would have jurisdiction over a case in which the defendant filed no petition for certiorari at all.

the cross-appeal requirement were not strictly jurisdictional, the court of appeals nonetheless erred in disregarding it.

1. As an initial matter, even if not jurisdictional, historical practice demonstrates that the cross-appeal requirement is a rule that admits of no exceptions. In the sentencing context, the rule derives from 18 U.S.C. § 3742(b), which allows the Government to appeal a sentence by filing a notice of appeal. The provision includes no exception from the notice of appeal requirement. Nor do the Rules of Appellate Procedure, which likewise require an appealing party to file a notice of appeal without exception. *See* Fed. R. App. P. 3(a)(1) (providing that "[a]n appeal permitted by law . . . may be taken *only by filing a notice of appeal* with the district clerk" within the allotted time) (emphasis added); Fed. R. App. P. 3(a)(2) ("An appellant's failure to take any step *other than the timely filing of a notice of appeal* does not affect the validity of the appeal . . . .") (emphasis added). *See also* Fed. R. App. P. 4(b)(1)(B)(ii) (providing that in a criminal case, when the Government is entitled to cross-appeal, "its notice of appeal *must be filed* in the district court within 30 days . . . of . . . the filing of a notice of appeal by the defendant") (emphasis added). Indeed, the rules expressly provide that no exception is permitted from the time requirements for taking appeals, *see* Fed. R. App. P. 26(b), a rule that would make no sense if a court could forgo the requirement that a notice of appeal be filed at all.

Just as the "mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over

parties not named in a notice of appeal," *Torres*, 487 U.S. at 315, the mandatory nature of the rules requiring timely cross-appeals would be vitiated if a court of appeals were permitted to expand a judgment in favor of a party that filed no notice of appeal at all.

If a different rule is to be adopted, it should be imposed by Congress, not the courts. *See United States v. Curry*, 47 U.S. (6 How.) 106, 113 (1848) ("[I]f the mode prescribed for removing cases by writ of error or appeal be too strict and technical, and likely to produce inconvenience or injustice, it is for Congress to provide a remedy by altering the existing laws; not for the court."). At the very least, if a revision is to be undertaken by the judiciary, it should be through the rulemaking process rather than through ad-hoc recognition of unwritten exceptions to the established rules. *See Bowles*, 127 S. Ct. at 2367 (noting that allowing even "narrow" exceptions "would give rise to litigation testing their reach and would no doubt detract from the clarity of the rule" while "congressionally authorized rulemaking would likely lead to less litigation than court-created exceptions without authorization").

2. At any rate, even if this Court were to consider establishing a judicially-created exception to the cross-appeal requirement, any justification that could be offered to support the Eighth Circuit's ruling would be "clearly inadequate to defeat the institutional interests in fair notice and repose that the rule advances." *Neztsosie*, 526 U.S. at 480.

To be sure, allowing courts to correct plainly erroneous sentences might advance an interest in ensuring that federal sentencing statutes are

properly and consistently applied in the lower courts, at least to some degree.[15] But an interest in more faithful and consistent enforcement of the law arises in every case in which a party fails to appeal a potentially erroneous judgment. It was present, for example, in *Torres*, when the petitioner alleged – and the court of appeals agreed – that his suit under an important civil rights statute had been improperly dismissed. *See Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1301-04 (9th Cir. 1982). It was present in *Neztsosie*, when the non-appealing parties alleged that the district court had erred in treading on the sovereignty of a Native American Tribe and its courts. *See El Paso Natural Gas Co. v. Neztsosie*, 136 F.3d 610, 613-15 (9th Cir. 1998), *rev'd*, 526 U.S. 473 (1999). Indeed, the interest in advancing the proper and uniform application of the law was at issue in each of the dozens of cases over the last two hundred years in which this Court has applied the cross-appeal requirement. Yet the Court has never concluded that this interest is sufficient to warrant an exception.

Moreover, any claim that there is a special need to correct unduly lenient criminal sentences is

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[15] Because the correction would arise only if an appellate court noticed and exercised its discretion to correct an unlawful sentence *sua sponte*, any advancement of this interest likely would be limited and sporadic. Of course, the cause of better enforcement of sentencing law would be advanced more significantly if the Court were to allow Government attorneys to advocate for correction of a sentence in the absence of an authorized appeal or cross-appeal, but that rule would flout the plain language of the CCCA and completely eviscerate the Solicitor General's authority to control Government appeals. *See supra* 17-18.

particularly weak. For most of the nation's history Congress did not see fit to provide *any* avenue for appellate correction of unlawfully low sentences. *See supra* 13-15. And when it finally provided an avenue for Government sentencing appeals, Congress put in place a limitation – the requirement of high-level authorization to appeal – that ensures that most unlawful sentences are not, in fact, appealed by the Government or reviewed by an appellate court. *See supra* 19 n.10 (noting that the Solicitor General has authorized Government appeals in only 0.3% of cases).

At the same time, permitting an exception for cases of plain error would substantially impair the "institutional interests in the orderly functioning of the judicial system." *Neztsosie*, 526 U.S. at 481-82. A notice of appeal functions to put "opposing parties and appellate courts on notice of the issues to be litigated and encourag[e] repose of those that are not."[16] *Id.* Simultaneously, the passing of the time to file a notice of appeal has long marked the point at which the interest in correct application of the law gives way to the equally important interest in repose. *See, e.g.*, *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398-402 (1981); *Ackermann v. United*

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[16] The lack of fair notice to the appellant is compounded when, as in this case, a court acts *sua sponte* and without briefing by the parties. *See Day v. McDonough*, 547 U.S. 198, 210 (2006) ("[B]efore acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions."). Such a practice also poses a very real risk that the court of appeals will itself err, deprived of the "crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984).

States, 340 U.S. 193, 198 (1950); *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943) (per curiam).

In any event, even if the courts have a degree of discretion to adopt exceptions to the statutory cross-appeal requirement, they may not, "in their discretion, reject the balance that Congress has struck in a statute." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001). As discussed above, permitting a court of appeals to decide for itself whether a criminal sentence should be increased in the absence of a Government cross-appeal would undermine the authority Congress bestowed on the Attorney General and Solicitor General to determine which potentially erroneous criminal sentences should be subject to appellate review. *See supra* 17-19.

3. Finally, while this Court has never suggested that compliance with the cross-appeal requirement could be waived or forfeited, the Court has held that compliance with *some* non-jurisdictional "claims processing" rules can be. *See, e.g.*, *Kontrick*, 540 U.S. at 456-60. But even if the cross-appeal requirement fell into that category, the judgment below would still have to be reversed. Even if not jurisdictional, emphatic claims processing rules "assure relief to a party properly raising them." *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam).[17] Here, the Government rightly acknowledges that petitioner

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[17] This Court has not decided whether such rules, "despite their strict limitations, could be softened on equitable grounds." *Kontrick*, 540 U.S. at 457. The question does not arise in this case either, as the court of appeals did not purport to apply any rule "of equitable tolling or any other equity-based exception." *Id.*

properly raised an objection to the court of appeals' *sua sponte* increase in his sentence. U.S. Br. 6, 13. Accordingly, the court's duty to enforce the rule "was mandatory," *Eberhart*, 546 U.S. at 18, and its failure to do so was reversible error. [18]

III. Even If An Exception To The Cross-Appeal Requirement Were Permitted For Plain Errors Under Rule 52(b), The Rule Did Not Authorize Modification of Petitioner's Sentence In This Case.

Finally, even if the courts of appeals were allowed to overlook the Government's failure to appeal in cases of "plain error" under Federal Rule of Criminal Procedure 52(b), the requirements of that rule were not met in this case.

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[18] In *Kontrick* and *Eberhart*, the Court held that a court's duty to enforce a particular claims processing rule was contingent on the opposing party raising a timely objection to the noncompliance. *Kontrick*, 540 U.S. at 456; *Eberhart*, 546 U.S. at 18-19. Unlike this case, neither *Kontrick* nor *Eberhart* involved *sua sponte* action by a court. When the court acts *sua sponte*, the requirement that the appellant make a timely objection makes little sense. Because the Government did not ask for the increase in petitioner's sentence, petitioner had no reason to raise any objection relating to the Government's failure to file a cross-appeal prior to the court of appeals' decision. And while petitioner did object after the decision was entered, it is hardly reasonable to say that a court of appeals may expand a judgment in favor of a non-appealing party *sua sponte*, unless the appellant objects through a petition for rehearing, at which point the panel would be obliged to reverse itself. In this context, the better rule would be to simply prohibit a court of appeals from increasing a sentence *sua sponte*, relying instead on the Government to request a revision of the sentence despite the lack of a cross-appeal, at which point the defendant would have an opportunity to object.

First, the rule does not authorize correction of errors that affect only the interests of the *Government*. By its plain terms, the rule permits correction only of an error "that affects substantial rights," Fed. R. Crim. P. 52(b), a phrase most naturally understood to refer to the rights of natural persons, not the Government. *See United States v. Barajas-Nunez*, 91 F.3d 826, 835-36 (6th Cir. 1996) (Siler, J., concurring in part and dissenting in part).[19]

Indeed, at the time the Rule was adopted in 1944, there was little possibility of any other construction. The Advisory Notes described the rule as "a restatement of existing law," Fed. R. Crim. P. 52 advisory committee's note, and cited as a source this Court's decision in *Wiborg v. United States*, 163 U.S. 632 (1896). In that case, the Court held that it was within a court's discretion to correct "a plain error [that] was committed in a matter so absolutely vital *to defendants*." 163 U.S. at 658 (emphasis added). *See also Clyatt v. United States*, 197 U.S. 207, 222 (1905) (noting that *Wiborg* "justifies us in examining

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[19] This inference draws support from other similarly worded rules. For example, Rule 11 provides that "variance from the requirements of this rule is harmless error if it does not affect *substantial rights*," Fed. R. Crim. P. 11(h) (emphasis added), plainly referring solely to the substantial rights of a criminal defendant. *See* Fed. R. Crim. P. 11(b)(1) (requiring court to inform defendant of a panoply of rights prior to accepting guilty plea). Rule 7 similarly uses essentially the same term – "substantial right" – in a manner that likewise leaves no room for doubt that it refers solely to the rights of the defendant. *See* Fed. R. Crim. P. 7(e) ("Unless an additional or different offense is charged or a *substantial right of the defendant* is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.") (emphasis added).

the question in case a plain error has been committed in a matter so vital *to the defendant*") (emphasis added). The restriction of the rule to errors affecting the rights of defendants was not accidental – at the time *Wiborg* was decided, the Government had no right of appeal in criminal cases, *see Carroll v. United States*, 354 U.S. 394, 400-01 (1957), much less any ability to seek correction of a plain error to which it had offered no objection below.

By the time the Federal Rules were enacted, the Government had obtained a limited right to appeal in some criminal cases.[20] Nonetheless, at the time the plain error rule was codified in the Rules, courts were still applying the doctrine only in cases of error prejudicial to the rights of a criminal defendant. *See, e.g., Crawford v. United States*, 212 U.S. 183, 203-05 (1909); *Clyatt*, 197 U.S. at 221-22; *Hemphill v. United States*, 112 F.2d 505, 507 (9th Cir. 1940), *rev'd on other grounds*, 312 U.S. 657 (1941); *Ayers v. United States*, 58 F.2d 607, 609 (8th Cir. 1932) (collecting cases).[21] As a codification of this "established appellate practice," *United States v. Olano*, 507 U.S. 725, 735 (1993), Rule 52(b) thus does not apply to

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[20] Beginning in 1907, and continuing through the adoption of the Rules, the Government had the ability to appeal certain issues relating to criminal indictments, pleas, and decisions arresting a judgment. *See Carroll*, 354 U.S. at 400-03; Act of Mar. 2, 1907, Pub. L. No. 59-223, ch. 2564, 34 Stat. 1246, 1246 (1907); Government Appeals Act of May 9, 1942, Pub. L. No. 77-543, ch. 295, § 1, 56 Stat. 271, 271-72 (1942) (codified at 18 U.S.C. § 682 (1946)).

[21] While it is difficult to prove a negative, petitioner has been unable to find any case noticing a plain error to the benefit of the Government prior to the time the Rule was promulgated.

errors injuring only a governmental interest in the prosecution.

Furthermore, even if Rule 52(b) could be applied to the benefit of the Government, it would not apply in the circumstances of this case. A court's power to correct a plain error should be exercised "sparingly." *Jones v. United States*, 527 U.S. 373, 389 (1999). In *Olano*, this Court explained that a court of appeals should correct a qualifying error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). *See also Jones*, 527 U.S. at 389. The facts of this case scarcely rise to that level. As discussed above, Congress contemplated that many sentencing errors benefiting a criminal defendant would be left uncorrected as a result of the Government's decision not to appeal the sentence. *See supra* 17-18. Thus, the fact of error alone is insufficient to warrant application of the Rule. Moreover, in this case, petitioner has already been subjected to a very lengthy sentence of 442 months. The district court's failure to increase that sentence further did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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February 14, 2008

RESPONDENT'S BRIEF

No. 07-330

11-13-07

In the Supreme Court of the United States

MICHAEL J. GREENLAW, AKA MIKEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, where petitioner appealed his criminal sentence as unreasonably long but the government did not cross-appeal, the court of appeals erred when, after rejecting petitioner's arguments, it *sua sponte* vacated the judgment and remanded to the district court with directions to increase the length of petitioner's sentence.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 481 F.3d 601.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2007. A petition for rehearing was denied on May 10, 2007 (Pet. App. 28a). On July 27, 2007, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including September 7, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of numerous drug and firearms offenses, includ-

ing two separate violations of 18 U.S.C. 924(c)(1). The district court sentenced petitioner to 442 months of imprisonment, to be followed by five years of supervised release. Petitioner appealed the sentence as unreasonably high; the government did not cross-appeal. On appeal, the court of appeals vacated and remanded for imposition of a higher sentence, holding that the district court's imposition of a 10-year, rather than 25-year, consecutive sentence for the second of petitioner's two Section 924(c)(1) convictions was erroneous and that, despite the government's failure to cross-appeal, the court of appeals should correct the error because it seriously affected substantial rights of the government and the public. Pet. App. 1a-15a, 19a.

1. Petitioner and approximately 26 others were members of a gang known as the "Family Mob," which operated a cohesive drug trafficking organization that controlled the sale of crack cocaine in a neighborhood on the south side of Minneapolis. From 1996 to 2003, the gang sold an estimated two to three kilograms of crack cocaine per week. Pet. App. 2a-3a; Gov't C.A. Br. 3-6.

The presence and use of firearms were ubiquitous features of the gang's distribution activities. A member of the Family Mob "would carry a gun for security purposes" in connection with transactions. Pet. App. 2a. Additionally, members hid firearms at various locations throughout their territory, and relayed those locations to each other, so that all members would have ready access to a gun when needed. *Id.* at 3a; Gov't C.A. Br. 9. In addition to providing protection from robbery and other threats, the Family Mob used the firearms (as well as violence and intimidation generally) to prevent rival dealers from moving into their territory. Pet. App. 3a; Gov't C.A. Br. 6-9; see also *id.* at 11-12 (discussing ex-

amples of specific acts of violence by petitioner). As a result of arrests and the execution of search warrants, the police recovered numerous weapons used by the Family Mob. See Pet. App. 3a-4a; Gov't C.A. Br. 13-14.

2. On November 16, 2004, a federal grand jury in the District of Minnesota returned a sixth superseding indictment against petitioner and others. Petitioner was charged on eight of the ten counts in the indictment: conspiracy to distribute in excess of fifty grams of crack cocaine, in violation of 21 U.S.C. 846 (Count 1); conspiracy to possess firearms in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(*o*) (Count 2); carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (Count 4); conspiracy to commit a violent crime (assault with a dangerous weapon) in aid of racketeering, in violation of 18 U.S.C. 1959(a)(6) (Count 5); committing a violent crime (assault with a dangerous weapon) in aid of racketeering, in violation of 18 U.S.C. 1959(a)(3) (Counts 6, 8); and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Counts 9, 10). Sixth Superseding Indictment; see Pet. App. 4a.

Following a two-week trial, a jury found petitioner guilty on seven of the eight counts, including two of the three Section 924(c)(1) counts, Counts 4, 10. The jury acquitted petitioner on the third Section 924(c)(1) count, Count 9.

3. At sentencing, the government argued that the convictions on Counts 4 and 10 required mandatory consecutive sentences of five and 25 years, respectively, because Count 10 was "a second or subsequent conviction" under 18 U.S.C. 924(c)(1)(C) and (2). See Gov't Resp. to Def.'s Position Regarding Sentencing 5; Sent. Tr. 9-10. The district court rejected the government's

argument. The court held that Count 10 was not "a second or subsequent conviction" based on its understanding that that language did not encompass a situation in which two violations of Section 924(c)(1) are "charged in the same indictment." Sent. Tr. 7, 9-10; Pet. App. 8a.[1] Because the jury had found that the firearm in Count 10 had been discharged, however, the court held that a ten-year consecutive sentence applied to that Count pursuant to 18 U.S.C. 924(c)(1)(A)(iii). Sent. Tr. 7-8.

Based on those rulings, the court sentenced petitioner to a total of 442 months of imprisonment, to be followed by five years of supervised release. Pet. App. 18a-19a. Specifically, the court sentenced petitioner to 262 months on Count 1, 240 months on each of Counts 2, 6, 8, and 36 months on Count 5, to be served concurrently with each other and the sentence on Count 1; 60 months on Count 4, to be served consecutively to the total imposed on Counts 1, 2, 5, 6, 8; and 120 months on Count 10, to be served consecutively to all other sentences. *Id.* at 18a. Because the statutory minimum sentence for the Count 1 drug conspiracy was ten years, see 21 U.S.C. 841(b)(1)(A) (2000 & Supp. V 2005), if the district court had applied five-year and 25-year minimum consecutive sentences to Counts 4 and 10, the minimum statutory sentence to which petitioner could have been sentenced would have been 480 months, rather than the 442 months the district court imposed.

4. Petitioner appealed, challenging both his convictions and sentence. See Pet. App. 2a. The government

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[1] At the time of sentencing, government counsel was unable to call to mind this Court's decision in *Deal* v. *United States*, 508 U.S. 129 (1993), see Sent. Tr. 9-10, which held that Section 924(c)(1) applies to second or subsequent convictions under Section 924(c)(1) that occur in the same trial as the first such conviction. See *Deal*, 508 U.S. at 137.

did not appeal or cross-appeal. After considering petitioner's claims, the court of appeals rejected them as without merit. See *id.* at 4a-7a. The court *sua sponte* vacated petitioner's sentence, however, and remanded with instructions that the district court impose on petitioner a new sentence that would include the statutory minimum 25-year sentence for Count 10. *Id.* at 15a. Citing this Court's decision in *Deal* v. *United States*, 508 U.S. 129 (1993), the court of appeals held that the district court had plainly erred in failing to treat Count 10 as "a second or subsequent conviction" and, as a result, in not imposing a mandatory, 25-year, consecutive sentence under 18 U.S.C. 924(c)(1)(C). Pet. App. 7a-10a, 15a.

The court of appeals noted that, although the government had objected below to the district court's failure to apply Section 924(c)(1)(C) and (2) to Count 10, the United States had not appealed the district court's sentence. Pet. App. 9a. The court stated, however, that it had discretion to raise and correct the error *sua sponte* under Federal Rule of Criminal Procedure 52(b) and this Court's decision in *Silber* v. *United States*, 370 U.S. 717, 718 (1962) (per curiam). Pet. App. 9a & n.5. Applying plain-error analysis, the court concluded that the sentence was directly and plainly contrary to the Court's decision in *Deal*. *Id.* at 8a-9a (quoting *Deal*, 508 U.S. at 132 ("[I]n the context of § 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of final judgment of conviction."). Further, the court concluded, the district court's failure to apply the statutory penalty for a second or subsequent conviction affected the substantial rights of the government and the public, and seriously affected the fairness, integrity, and public rep-

utation of judicial proceedings. *Id.* at 9a-10a. The court therefore vacated the sentence and remanded for the district court "to impose the statutorily mandated consecutive minimum sentence of 25 years under Count 10." *Id.* at 15a.

Petitioner filed a petition for rehearing and rehearing en banc in which he argued that the court of appeals should not have corrected the district court's error. Petitioner's principal argument was that the error had not seriously affected the fairness, integrity, or public reputation of judicial proceedings, and so relief was not appropriate under the fourth prong of plain-error review. Pet. for Reh'g 1-11. Petitioner also contended that the panel "could have, and should have, elected to take the same route" as the Seventh Circuit in *United States* v. *Rivera*, 411 F.3d 864, 867, cert. denied, 546 U.S. 966 (2005): "Because the government did not raise an appeal or cross-appeal, [petitioner's] sentence should have been left alone." Pet. for Reh'g 10. On May 10, 2007, the court of appeals denied the petition. Pet. App. 28a.

5. On August 28, 2007, the district court resentenced petitioner. The court imposed a 25-year consecutive sentence on Count 10 and left the sentences on the remaining counts unchanged. As a result, petitioner's total sentence was increased to 622 months of imprisonment, to be followed by five years of supervised release. Resentencing J.

RESPONDENT'S BRIEF

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No. 07-330

2-14-08

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QUESTION PRESENTED

Whether, where petitioner appealed his convictions and sentence as unreasonably long, but the government did not cross-appeal, the court of appeals erred when, after rejecting petitioner's arguments, it *sua sponte* vacated the judgment and remanded to the district court with directions to increase the length of petitioner's sentence.

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In the Supreme Court of the United States

No. 07-330

MICHAEL J. GREENLAW, AKA MIKEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 481 F.3d 601.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2007. A petition for rehearing was denied on May 10, 2007 (Pet. App. 28a). On July 27, 2007, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including September 7, 2007, and the petition was filed on that date. The petition for a writ of certiorari was granted on January 4, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

The relevant statutory provisions and federal rules are reprinted in an appendix to this brief. App., *infra*, 1a-22a.

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of numerous drug and firearms offenses, including two separate violations of 18 U.S.C. 924(c)(1). The district court sentenced petitioner to a total of 442 months of imprisonment, to be followed by five years of supervised release. Petitioner appealed; the United States did not. The court of appeals rejected petitioner's claims, but vacated and remanded for imposition of a higher sentence, holding that the district court's imposition of a ten-year, rather than a 25-year, consecutive sentence for the second of petitioner's two Section 924(c)(1) convictions was erroneous. The court concluded that, despite the government's failure to cross-appeal, it should correct the error because the error seriously affected substantial rights of the government and the public. Pet. App. 1a-15a, 19a. On remand, the district court sentenced petitioner to 622 months of imprisonment, to be followed by five years of supervised release. J.A. 109-110.

1. Petitioner and others were members of a gang known as the "Family Mob," which operated as a cohesive drug trafficking organization that controlled the sale of crack cocaine in a neighborhood on the south side of Minneapolis. Pet. App. 2a-3a. From 1996 to 2003, the gang sold an estimated two to three kilograms of crack cocaine per week. *Id.* at 2a; J.A. 13, 27.

In connection with drug transactions, a member of the Family Mob "would carry a gun for security purposes." Pet. App. 2a. Members also hid firearms at various locations throughout their territory and relayed those locations to each other, so that all members would have ready access to a gun when needed. *Id.* at 3a. In addition to providing protection from robbery and other threats, the Family Mob used firearms (as well as violence and intimidation generally) to prevent rival dealers from moving into their territory. *Ibid.* As a result of the arrests and the execution of search warrants, the police recovered numerous weapons used by the Family Mob. See *id.* at 3a-4a.

2. On November 16, 2004, a federal grand jury in the District of Minnesota returned a sixth superseding indictment against petitioner and others. J.A. 13, 27-37. Petitioner was charged on eight of the ten counts in the indictment: conspiracy to distribute in excess of fifty grams of crack cocaine, in violation of 21 U.S.C. 846 (Count 1); conspiracy to possess firearms in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(*o*) (Count 2); carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (Count 4); conspiracy to commit a violent crime (assault with a dangerous weapon) in aid of racketeering, in violation of 18 U.S.C. 1959(a)(6) (Count 5); committing a violent crime (assault with a dangerous weapon) in aid of racketeering, in violation of 18 U.S.C. 1959(a)(3) (Counts 6 and 8); and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Counts 9 and 10). J.A. 27-36; see Pet. App. 4a.

Following a two-week trial (Pet. App. 4a), a jury found petitioner guilty on seven of the eight counts, in-

cluding two of the Section 924(c)(1) counts, Counts 4 and 10. The jury acquitted petitioner on the third Section 924(c)(1) count, Count 9. J.A. 38-45.

3. At sentencing, the government argued that the convictions on Counts 4 and 10 required mandatory consecutive sentences of five and 25 years, respectively, because Count 10 was "a second or subsequent conviction" under 18 U.S.C. 924(c)(1)(C) and (2). See J.A. 51-52, 61-62. The district court rejected the government's argument. The court held that Count 10 was not "a second or subsequent conviction" based on its view that a conviction could not be second or subsequent when the two violations of Section 924(c)(1) are "charged in the same indictment." J.A. 59, 61-62; Pet. App. 8a.[1] Because the jury had found that the firearm in Count 10 had been discharged, however, the court held that a ten-year consecutive sentence applied to that count under 18 U.S.C. 924(c)(1)(A)(iii). J.A. 59-60; see J.A. 44-45.

Based on those rulings, the court sentenced petitioner to a total of 442 months of imprisonment, to be followed by five years of supervised release. Pet. App. 18a-19a. Specifically, the court sentenced petitioner to 262 months on Count 1, 240 months on each of Counts 2, 6, and 8, and 36 months on Count 5, to be served concurrently with each other; 60 months on Count 4 (the first Section 924(c) conviction), to be served consecutively to

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[1] At the time of sentencing, the government objected to the court's ruling. See J.A. 62-63. Government counsel was unable to call to mind, however, this Court's decision in *Deal* v. *United States*, 508 U.S. 129 (1993), see J.A. 61-63, which held that, when a defendant is charged with more than one Section 924(c) offense in the same indictment and found guilty of multiple such offenses in the same trial, all but the first Section 924(c) conviction are treated as a "second or subsequent conviction." See *Deal*, 508 U.S. at 132-137.

the total imposed on Counts 1, 2, 5, 6, and 8; and 120 months on Count 10 (the second Section 924(c) conviction), to be served consecutively to all other sentences. *Id.* at 18a.

4. Petitioner appealed, challenging both his convictions and his sentence. See Pet. App. 2a; J.A. 79. Petitioner contended that, instead of being sentenced to 442 months, he should have been sentenced to 15 years of imprisonment. After considering petitioner's claims, the court of appeals rejected them as without merit. See Pet. App. 4a-7a.

The government did not appeal or cross-appeal. Nor did the government request in briefing or at argument that the court vacate or increase petitioner's sentence based on any error by the district court. To the contrary, the government contended that the sentence should be affirmed. See J.A. 84-86. In response to petitioner's challenge to the reasonableness of his sentence, however, the government did note, *inter alia*, that Section 924(c)(1) provided for a 25-year, mandatory minimum, consecutive sentence on Count 10, rather than the ten-year sentence the district court imposed. J.A. 83, 85.[2]

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[2] During oral argument, the court of appeals asked petitioner's counsel how petitioner avoided the 25-year mandatory minimum on Count 10. In so doing, however, the court noted that the government had not appealed the sentencing issue, and it elicited a concession from petitioner's counsel that the 442-month sentence was reasonable if the district court should have sentenced petitioner to a consecutive 25-year sentence on Count 10. In addressing the issue, government counsel noted that petitioner should have received a 25-year sentence on the count and that the government preserved that issue in the district court, but he noted that the government had not appealed the issue. Consistent with the government's brief, counsel argued that that fact supported the reasonableness of the district court's sentence and urged

Despite the government's failure to file a cross-appeal, the court of appeals *sua sponte* vacated petitioner's sentence and remanded with instructions that the district court impose a new sentence that would include the statutory minimum 25-year sentence for Count 10. Pet. App. 8a-10a, 15a. The court of appeals noted that, although the government had objected below to the district court's failure to apply Section 924(c)(1)(C) and (2), the United States had not appealed the district court's sentence. *Id.* at 9a. The court stated, however, that it had discretion to raise and correct the error *sua sponte* under Federal Rule of Criminal Procedure 52(b) and this Court's decision in *Silber* v. *United States*, 370 U.S. 717, 718 (1962) (per curiam). Pet. App. 9a-10a & n.5.

Applying plain-error analysis, the court concluded that the sentence was directly contrary to the Court's decision in *Deal* v. *United States*, 508 U.S. 129 (1993). Pet. App. 8a-9a (quoting *Deal*, 508 U.S. at 132) ("[I]n the context of § 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of final judgment of conviction."). Further, the court concluded that the district court's failure to apply the statutory penalty for a second or subsequent conviction affected the substantial rights of the government and the public, and seriously affected the fairness, integrity, and public reputation of judicial proceedings. *Id.* at 9a-10a.[3] The court therefore

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the court to reject the petitioner's appellate arguments. See C.A. Oral Argument (Sept. 26, 2006) <http://www.ca8.uscourts.gov/oralargs/oaFrame.html> (Case No. 05-3391).

[3] The court of appeals held that the district court also had committed plain error in holding that under *United States* v. *Booker*, 543 U.S. 220 (2005), it could not make a fact-based adjustment under the Guidelines where there was no jury finding on the fact. Pet. App. 10a n.6. The

vacated the sentence and remanded for the district court "to impose the statutorily mandated consecutive minimum sentence of 25 years under Count 10." *Id.* at 15a.

5. Petitioner filed a petition for rehearing and rehearing en banc in which he argued that the court of appeals should not have corrected the district court's error. Petitioner's principal argument was that the error had not seriously affected the fairness, integrity, or public reputation of judicial proceedings, and so relief was not appropriate under the fourth prong of plain-error review. J.A. 90-91, 93-96. Petitioner also contended that the panel "could have, and should have, elected to take the same route" as the Seventh Circuit in *United States* v. *Rivera*, 411 F.3d 864, cert. denied, 546 U.S. 966 (2005), which reasoned that "'[b]y deciding not to take a cross-appeal, the United States ensured that [the defendant's] sentence cannot be increased.'" J.A. 95 (quoting *Rivera*, 411 F.3d at 867) (alteration in original). Accordingly, petitioner contended that, "[b]ecause the government did not raise an appeal or cross-appeal, [petitioner's] sentence should have been left alone." J.A. 95-96. The court of appeals denied the petition without calling for a response and without recorded dissent. Pet. App. 28a.

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court of appeals, however, declined to correct that error. *Id.* at 10a-11a n.6. The court explained that it had corrected the Section 924(c)(1)(C) error "primarily because the error violates a Congressional mandate." *Id.* at 11a n.6. In contrast, because the Guidelines are advisory, "'the effect of the [Guidelines] error on the result in the district court is uncertain or indeterminate—[so] we would have to speculate' as to how the error affected the substantial rights of the parties." *Ibid.* (quoting *United States* v. *Pirani*, 406 F.3d 543, 553 (8th Cir.) (en banc), cert. denied, 546 U.S. 909 (2005)).

6. On August 28, 2007, the district court resentenced petitioner. The court imposed a 25-year consecutive sentence on Count 10 and left the sentences on the remaining counts unchanged. As a result, petitioner's total sentence was increased to 622 months of imprisonment, to be followed by five years of supervised release. See J.A. 103-104, 109-110. Neither party appealed that judgment.

SUMMARY OF ARGUMENT

I. Congress is constitutionally charged with defining the jurisdictional limits of the federal appellate courts. Congress can place limits not only on the general class of cases over which those courts have jurisdiction, but also when and under what conditions they can hear those cases. In Section 3742 of Title 18, Congress specifically defined and limited the jurisdiction of courts of appeals over sentencing errors in criminal cases. The text, structure, and history of Section 3742 compel the conclusion that the government's filing of a notice of appeal is a jurisdictional prerequisite for an appellate court to correct a sentencing error that aggrieves the government.

This Court has long recognized that courts of appeals lack jurisdiction over government appeals of final judgments in criminal cases absent statutory provisions that expressly grant that authority. The Court has also construed any such authority narrowly. Acting against this background understanding, Congress conferred appellate jurisdiction over sentencing errors in Section 3742, but only in certain limited circumstances. In particular, Congress separately delineated which types of sentencing errors defendants could appeal and which types of errors the government could appeal. This Court has

held that this delineation of claims places a jurisdictional limitation on appellate jurisdiction. See *United States* v. *Ruiz*, 536 U.S. 622 (2002).

Section 3472 not only limits the types of errors that appellate courts have jurisdiction to correct, it also requires that the particular party aggrieved by a sentencing error file a notice of appeal in order to vest jurisdiction in the court of appeals to correct that error. As such, a notice of appeal by a defendant does not vest the court of appeals with jurisdiction to correct a sentencing error that aggrieves the government. Rather, the statute requires the government to file a notice of appeal to trigger court of appeals' jurisdiction to correct such an error. Section 3472's requirement that one of three high-ranking Department of Justice officials must personally approve any government sentencing appeal further confirms that a defendant's decision to appeal does not vest the court of appeals with jurisdiction to correct an error that aggrieves the government. That conclusion is bolstered by the structure of the statute, which provides for notices of appeal by defendants in a separate subsection from its provision authorizing notices of appeals by the government. And, given the historical limitations on government appeals in criminal cases, the statute should not be read to vest courts of appeals with jurisdiction to correct errors that aggrieve the government on the basis of only a defendant's appeal, in the absence of plain language doing so. The court of appeals thus lacked jurisdiction to order an increase in petitioner's sentence.

II. Even if the Court concludes that a government notice of appeal is not a prerequisite to an appellate court's jurisdiction to correct a sentencing error that aggrieves the government, the filing of a timely notice of

a cross-appeal is a mandatory claim-processing rule that the court has a duty to enforce when the rule is timely asserted. For over two hundred years, this Court has recognized that an appellate court cannot enlarge the judgment in favor of a party that fails to file a cross-appeal. And the Federal Rules establish rigid time limitations for the filing of a cross-appeal.

These long-established rules of practice are the type of inflexible rules that do not admit of judicial exception. Where, as here, the court would lack authority under the rules to extend the time for filing a notice of appeal, it would be counter-intuitive to allow it to excuse the filing of the notice of appeal altogether. The requirement of a timely cross-appeal serves the same interests as other claim-processing rules that this Court has recognized are mandatory: it promotes the interests of the orderly function of the judicial system, provides notice to opposing parties, and advances repose of issues. The rule must be enforced when it is timely asserted. Here, petitioner timely asserted the government's failure to cross-appeal, and the court of appeals therefore should not have enlarged the judgment against him.

There is no warrant for creating an exception to this long-standing requirement in this case. Contrary to the apparent view of the court of appeals, nothing in the language or history of Rule 52(b) suggests that it creates an exception to the long-standing cross-appeal requirement. Nor is there any reason to create an exception to the cross-appeal requirement in this case, under the rubric of Rule 52(b) or otherwise. Section 3742(b) charges three high-ranking Department of Justice officials with the prosecutorial discretion to determine whether the government should appeal an erroneous sentence. Those officials are institutionally better suit-

ed to protect, and fully capable of protecting, the interests of the government and the public with respect to such sentences. Appellate courts should not take on that role *sua sponte*.

ARGUMENT

THE COURT OF APPEALS ERRED IN *SUA SPONTE* ORDERING THE DISTRICT COURT TO INCREASE PETITIONER'S SENTENCE

Although the government did not appeal or cross-appeal from petitioner's sentence, the court of appeals, on petitioner's appeal, *sua sponte* ordered that the sentence be increased. That action was error. First, the court of appeals lacked jurisdiction under 18 U.S.C. 3742 (2000 & Supp. V 2005) to rule that a sentence was too low when the government did not appeal or cross-appeal. Second, and in any event, the modification of the judgment in favor of a non-appealing party violated a settled rule of appellate practice, which the court had a duty to enforce upon petitioner's timely invocation.

I. THE COURT OF APPEALS LACKED JURISDICTION TO ORDER AN INCREASE IN THE SENTENCE IN THE ABSENCE OF A NOTICE OF APPEAL BY THE GOVERNMENT UNDER SECTION 3742

A. The Jurisdiction Of The Courts Of Appeals Is Limited To That Conferred By Statute

This Court's recent decisions "have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules," explaining that "jurisdiction" refers to the limits on a court's personal jurisdiction over parties or its subject-matter jurisdiction over "classes of cases." *Bowles* v. *Russell*, 127 S. Ct. 2360,

2364-2365 (2007) (quoting *Eberhart* v. *United States*, 546 U.S. 12, 16 (2005) (per curiam)); *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004); see *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 753-754 (2008). Because "Congress decides what cases the federal courts have jurisdiction to consider," *Bowles*, 127 S. Ct. at 2365, the Court has observed that requirements that are created only by court-promulgated rules are not properly termed "jurisdictional." *Ibid.*; *Kontrick*, 540 U.S. at 452. At the same time, however, this Court has recognized that statutory requirements can have "jurisdictional significance." *Bowles*, 127 S. Ct. at 2364. Finding jurisdictional significance in statutory limits on the authority of the lower federal courts has underpinnings in Congress's power under Article III of the Constitution to define and limit the power of those courts. See *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922) ("Only the jurisdiction of the Supreme Court is derived from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress."); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448-449 (1850) ("Congress, having the power to establish the courts, must define their respective jurisdictions. * * * Courts created by statute can have no jurisdiction but such as the statute confers.").

In *Bowles*, the Court enforced statutory limits on the jurisdiction of federal appellate courts. The district court had purported to reopen the time period for filing a notice of appeal for 17 days, in conflict with 28 U.S.C. 2107(c), which permitted a district court to reopen that period for only 14 days. 127 S. Ct. at 2363. Because the would-be appellant filed his notice of appeal outside the 14-day period allowed by the statute, this Court held that the court of appeals lacked jurisdiction over the

appeal. In so holding, the Court recognized that the notion of subject-matter jurisdiction includes congressional decisions not only about "whether federal courts can hear cases at all," but also "when, and under what conditions, federal courts can hear them." *Id.* at 2365.

In this case, Congress has provided for a specific scheme to govern sentencing appeals in the federal system. See 18 U.S.C. 3742 (2000 & Supp. V 2005). The text, structure, and history of that statute confirm that it places jurisdictional limitations on the court of appeals to hear sentencing appeals, and that the filing of a notice of appeal by the government in a criminal case is necessary to vest the court of appeals with jurisdiction to correct sentencing errors that result in a sentence being too low.

B. Congress Enacted Section 3742 To Provide Appellate Jurisdiction Over Sentencing Appeals In Criminal Cases In Certain Limited Situations

Although 28 U.S.C. 1291 and its predecessors granted appellate jurisdiction over final orders and decisions of the district courts, this Court long ago construed those jurisdictional provisions not to confer generally applicable jurisdiction over appeals by the government of final orders in criminal cases. See *United States* v. *Sanges*, 144 U.S. 310, 323 (1892) (interpreting the general grant of appellate jurisdiction to circuit courts of appeals to review a "final decision * * * in all cases" in the Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 828, not to apply to government appeals in a criminal case). In so ruling, the Court emphasized the historic limitations on appellate authority over government appeals in criminal cases. *Id.* at 312-323; *Carroll* v. *United States*, 354 U.S. 394, 400 (1957) (noting that "the history

of federal appellate jurisdiction" supports the principle that "appeals by the Government in criminal cases are something unusual, exceptional, not favored"). In light of that unique history, the Court in *Sanges* reasoned, the statutory provision "giving the Circuit Courts of Appeals in general terms appellate jurisdiction of criminal cases, says nothing as to the party by whom the writ of error may be brought, and * * * [i]t is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States." 144 U.S. at 323.[4]

For these same reasons, this "Court has long taken the view that the United States has no right of appeal in a criminal case, absent explicit statutory authority." *United States* v. *Scott*, 437 U.S. 82, 84-85 (1978) (citing *Sanges*, *supra*); *United States* v. *Sisson*, 399 U.S. 267 (1970) (dismissing government appeal for lack of jurisdiction because not authorized by 18 U.S.C. 3731 (1964 & Supp. V 1969), which authorized government appeals

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[4] That does not mean that Section 1291 is entirely inapplicable to government appeals in criminal cases. The Court recognized in *Carroll* that the government might be able to invoke Section 1291 and the collateral order doctrine recognized in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), in qualifying instances. *Carroll*, 354 U.S. at 403 (noting that such instances are "very few"); see, *e.g.*, *United States* v. *Horn*, 29 F.3d 754, 767-769 (1st Cir. 1994) (finding authority under heightened collateral order doctrine to hear government appeal of district court's order awarding, pursuant to court's supervisory authority, costs and fees against the government in a criminal case). That recognition does not detract from the general presumption against appeals by the government in criminal cases absent express statutory authorization. *Carroll*, 354 U.S. at 400-401. And, in the context of criminal sentencing appeals, the specific provisions in Section 3742 would govern over any more general provision for appeals from final decisions of the district courts. See, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2348 (2007).

from certain types of decisions in criminal cases); *United States* v. *Dickinson*, 213 U.S. 92 (1909) (extending *Sanges* to certiorari review); see *Carroll*, 354 U.S. at 399 (noting that "since the jurisdictional statutes prevailing at any given time are so much a product of the whole history of both growth and limitation of federal-court jurisdiction since the First Judiciary Act, 1 Stat. 73, they have always been interpreted in the light of that history and of the axiom that clear statutory mandate must exist to found jurisdiction").

Sentencing appeals were, historically, an area subject to particular restraint. Although the broad jurisdictional grants over final judgments were deemed sufficient to establish appellate jurisdiction over a defendant's appeal of his sentence, the legal claims available to defendants on such appeals were extremely limited. See, *e.g.*, *Koon* v. *United States*, 518 U.S. 81, 96 (1996) (noting that, "[b]efore the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal"); *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974) (noting "the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end"). And, historically, there is no case in this Court that has authorized the government to appeal a sentence under general federal appellate jurisdiction.[5]

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[5] In 1970, Congress provided jurisdiction for sentencing appeals by the government and defendants in two limited instances, both of which were replaced by the general provisions in Section 3742. See Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, § 1001(a), 84 Stat. 948 (enacting 18 U.S.C. 3576 (1970) (review of sentences of "dangerous special offenders"), repealed by SRA § 212(2), 98 Stat. 1987; and 18 U.S.C. 3575 (1970) (sentencing of "dangerous

In 1984, in conjunction with its overhaul of federal sentencing, Congress considerably revised its approach to appellate review of sentences by providing appellate jurisdiction "for review of an otherwise final sentence" in specified circumstances. 18 U.S.C. 3742(a) and (b); see Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98-473, Tit. II, Chap. II, § 213(a), 98 Stat. 2011. Congress sought to "establish[] a limited practice of appellate review of sentences," while at the same time not unduly burdening courts of appeals by opening sentences to reconsideration based on every possible claim. See, *e.g.*, S. Rep. No. 225, 98th Cong., 1st Sess. 149-150, 154 (1983). Congress did so by defining the specific claims that could be maintained on appeal by defendants, 18 U.S.C. 3742(a)(1)-(4), and those that could be maintained by the government, 18 U.S.C. 3742(b)(1)-(4).

In *United States* v. *Ruiz*, 536 U.S. 622 (2002), this Court held that Section 3742 delimits appellate jurisdiction, in the strict meaning of that term. *Id.* at 626-628; see *Koon*, 518 U.S. at 96 (describing Section 3742 as providing "limited appellate jurisdiction to review federal sentences"). In *Ruiz*, this Court considered, in the context of a defendant's sentencing appeal, "a question of statutory jurisdiction that potentially blocks our consideration." 536 U.S. at 626. The Court observed that Sec-

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special offenders"), repealed by SRA § 212(2), 98 Stat. 1987; Controlled Substances Act (CSA), Pub. L. No. 91-513, Tit. II, § 409(h), 84 Stat. 1268 (21 U.S.C. 849(h) (1970)) (review of sentences of "dangerous special drug offender[s]"), repealed by SRA § 219, 98 Stat. 2027. And even that limited appellate right prompted a constitutional challenge. In *United States* v. *DiFrancesco*, 449 U.S. 117 (1980), the Court held that authorization under former 18 U.S.C. 3576 of appeal by the United States of a criminal sentence did not violate the Double Jeopardy Clause.

tion 3742(a) delineates certain classes of sentencing errors as to which a "defendant may file a notice of appeal." *Id.* at 626-627 (quoting 18 U.S.C. 3742(a)). Based on that language, the Court concluded that appellate jurisdiction existed only if the defendant's appeal fit within one of the specified grounds. *Id.* at 627-628. The Court ultimately held that it had jurisdiction to reach the merits, because if the defendant's underlying claim were correct, the sentence would have been "imposed in violation of law," which is an express basis for appeal under 18 U.S.C. 3742(a)(1). *Ruiz*, 536 U.S. at 628. *Ruiz* thus establishes that the limitations on sentencing appeals in Section 3742 are jurisdictional limits.[6]

C. Congress Conditioned Appellate Jurisdiction To Correct Errors In Criminal Sentences On The Filing Of A Notice Of Appeal By The Party Aggrieved By The Error

Just as Section 3742(a) defines permissible sentencing appeals by defendants, Section 3742(b) delineates certain types of sentencing errors for which "[t]he Government may file a notice of appeal." 18 U.S.C. 3742(b). Section 3742(b)(1) provides that the government may appeal a sentence that "was imposed in viola-

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[6] This Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), broadened the grounds for an appeal of a within-range sentence by allowing a party to challenge any sentence as "unreasonable." See, *e.g.*, *id.* at 260 (noting that "the Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under § 3553(a))"); *id.* at 261 (establishing review for "unreasonable[ness]"). Such appeals are best understood as arising under Section 3742(a)(1)'s provision for appeals on the ground that the sentence "was imposed in violation of law." Nothing in *Booker* casts doubt on this Court's holding in *Ruiz* that the delineation of the claims that may be pursued under Section 3742 is of a jurisdictional character.

tion of law." 18 U.S.C. 3742(b)(1). The statute further provides that "[t]he Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." 18 U.S.C. 3742(b).[7]

Under this Court's reasoning in *Ruiz*, courts of appeals lack jurisdiction over government appeals in sentencing cases that assert *types* of errors other than those delineated in Section 3742(b)(1). See *Ruiz*, 536 U.S. at 626-628. Here, the type of error at issue—a sentence imposed in violation of law—is one type of error set forth in Section 3742(b)(1). Section 3742(b), however, does not confer free-floating jurisdiction on the courts to correct sentencing errors. Rather, the statute requires the government to file a notice of appeal to trigger appellate jurisdiction to correct an error that harms the government. That textual conclusion is supported by the procedural prerequisites to the government's pursuit of appeal and the long tradition that government appeals in criminal cases must be "plainly provided by the Congress." *Carroll*, 354 U.S. at 400.[8]

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[7] As originally enacted, the provision required that "the Attorney General or the Solicitor General personally approve[] the filing of the notice of appeal." SRA § 213(a), 98 Stat. 2012 (18 U.S.C. 3742(b) (Supp. II 1984)). The language has since been modified to allow for the filing of a protective notice of appeal until "further prosecut[ion]" of the appeal is approved. 18 U.S.C. 3742(b).

[8] Petitioner generally noticed an appeal "from the final judgment, conviction and sentence." J.A. 79. On appeal, he contended that the district court erred in not granting his motion for a downward departure and that the length of his sentence was unreasonable. See Pet. App. 6a-7a. In light of this Court's decision in *Booker*, see note 6, *supra*, his challenge to his sentence as "unreasonable" constitutes a claim under 18 U.S.C. 3742(a)(1), which authorizes a defendant to assert

Both the text and structure of Section 3742 point to the conclusion that the court of appeals' jurisdiction to correct a sentencing error that aggrieves the government is vested only by the "fil[ing] of a notice of appeal" by the government. 18 U.S.C. 3742(b). Unlike more general statutory grants of appellate jurisdiction, such as 28 U.S.C. 1291, Section 3742 defines not only the classes of sentencing errors over which appellate courts have jurisdiction, but also establishes which particular party—the defendant or the government—can appeal which class of claim. The statute also expressly conditions an appeal by either party on the requirement that the particular party "file a notice of appeal." 18 U.S.C. 3742(a) and (b). This requirement is reinforced by the structure of the provision, which includes one subsection for appeals by defendants and a separate subsection for appeals by the government. See *ibid.*

Reading the statute to require the government to file a notice of appeal in order for the court of appeals to have jurisdiction to review sentencing errors that aggrieve the government is further supported by Congress's decision to entrust to the Attorney General and the Solicitor General (or his designated Deputy Solicitor General) the determination whether the government should pursue such appeals. See 18 U.S.C. 3742(b). The purpose of that provision is to ensure that the government has made a considered decision to draw upon appellate resources before an appellate court considers sentencing rulings that harm the government's interests. The defendant's decision to pursue an appeal does not fulfill that purpose, and permitting appellate courts

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that his sentence was "imposed in violation of law." See, *e.g.*, *United States* v. *Mickelson*, 433 F.3d 1050, 1052-1055 (8th Cir. 2006).

to notice sentencing errors that harm the government *sua sponte* would undermine it. The text and structure of the provision thus compel the conclusion that the party harmed by a sentencing error must invoke the court's jurisdiction by filing its own notice of appeal before the court of appeals has jurisdiction to award it any relief. Absent an appeal by the government, duly authorized by the official designated by Congress, the court of appeals lacks jurisdiction. See *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88 (1994) (dismissing petition for want of jurisdiction absent timely authorization of the certiorari petition by the Solicitor General).[9]

The background understanding that government appeals must be clearly and explicitly authorized by

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[9] The earlier, more limited sentencing appeal statutes, see note 5, *supra*, similarly reflected a congressional view that, in the absence of express language to the contrary, an appeal by one party did not constitute an appeal by the other. In those earlier statutes, Congress provided that any appeal by the government of a sentence should be "*deemed* the taking of a review of the sentence and an appeal of the conviction by the defendant." OCCA § 1001(a), 84 Stat. 950 (18 U.S.C. 3576 (1970)) (emphasis added); see CSA § 409(h), 84 Stat. 1269 (21 U.S.C. 849(h) (1970)) (same). But Congress made clear that the "deeming" did not run in the other direction: "a sentence may be made more severe only on review of the sentence taken by the United States and after hearing." OCCA § 1001(a), 84 Stat. 950-951 (18 U.S.C. 3576 (1970)); see CSA § 409(h), 84 Stat. 1269 (21 U.S.C. 849(h) (1970)) (same). In contrast to the earlier statutes, 18 U.S.C. 3742(a) and (b) do not provide that an appeal by any party will be deemed an appeal by another, and its very different text suggests otherwise. Similarly, because Section 3742 expressly distinguishes appeals by defendants and ones by the government, its structure indicates that a government appeal is required to remedy an error harmful to the government's interests. Congress therefore had no need to carry forward the language expressly prohibiting the increase of a sentence absent a government appeal.

statute further confirms the jurisdictional character of the limitations in Section 3742(b). See, *e.g.*, *Scott*, 437 U.S. at 84-85; *Carroll*, 354 U.S. at 399-405; *Sanges*, 144 U.S. at 323. "The history shows resistance of the Court to the opening of an appellate route for the Government until it was plainly provided by Congress, and after that a close restriction of its uses to those authorized by the statute." *Carroll*, 354 U.S. at 400. Although Congress could have provided more broadly for appellate jurisdiction to review sentences, it instead narrowed the class of claims for which review was authorized and broke into separate subsections appeals by defendants and appeals by the government, tying each to the filing of "a notice of appeal." 18 U.S.C. 3742(a) and (b). Consistent with that distinction, the Senate Report evidences an understanding that, unless Congress authorized the government to appeal, the appellate court "could only reduce excessive sentences but not enhance inadequate ones." See S. Rep. No. 225, *supra*, at 151; *ibid.* (noting that "it is clear that a system * * * in which sentence increase is possible as a consequence of sentence review initiated by the government[] is not objectionable on constitutional grounds"). Indeed, the Report reflects the concern that a system that would allow appellate courts to increase a sentence upon a defendant's appeal would "place[] an undesirable strain on the defendant's right to seek sentence review." *Id.* at 151 n.370. In the absence of statutory language plainly providing for appellate jurisdiction to correct errors that aggrieve the government based solely on the *defendant's* appeal, the Court should not find such jurisdiction.

That conclusion is buttressed by Section 3731, which similarly provides for party-specific appellate jurisdiction in criminal cases. Section 3731 defines a set of cir-

cumstances in which the government may appeal. The statute authorizes appeals only "by the United States." 18 U.S.C. 3731 (2000 & Supp. V 2005). As numerous courts of appeals have recognized, "this statute does not provide for a cross-appeal by the defendant." *United States* v. *Marasco*, 487 F.3d 543, 546 (8th Cir. 2007); see, *e.g.*, *United States* v. *Hamilton*, 46 F.3d 271, 279 n.8 (3d Cir. 1995) (Section 3731 "preclud[es] a defendant from filing a cross-appeal") *United States* v. *Becker*, 929 F.2d 442, 447 (9th Cir.) ("We lack jurisdiction to consider these expanded issues in this section 3731 appeal. A defendant may not file a cross appeal to a section 3731 interlocutory appeal."), cert. denied, 502 U.S. 862 (1991); *United States* v. *Margiotta*, 646 F.2d 729, 734 (2d Cir. 1981) ("We lack appellate jurisdiction" because cross-appeal "is unavailable with interlocutory appeals pursuant to § 3731."). That approach reinforces the conclusion that, in criminal appellate statutes, one party's appeal does not give a court of appeals jurisdiction to resolve the other party's claims.[10]

Accordingly, this Court should conclude that the absence of a notice of appeal by the government under Section 3742(b) is an event of jurisdictional significance, depriving the court of appeals of authority to review a claim that falls within the authorized bases for review under that provision. (The same conclusion applies in the reverse direction: a court of appeals has no jurisdic-

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[10] In contrast, under the general language of Section 1291, which makes no reference to the filing of a notice of appeal by any particular party, it could be argued that, once one party files a timely notice of appeal, that notice of appeal vests the court of appeals with jurisdiction over the order appealed from in its entirety, at least as between the appellant and his opposing party—including portions of the order unfavorable to the non-appealing opposing party. See pp. 26-29, *infra*.

tion to grant sentencing relief in favor of a defendant if only the government has filed a notice of appeal.) Because the government did not file a notice of appeal under Section 3742(b) in this case, the court of appeals therefore lacked jurisdiction to increase petitioner's sentence.[11]

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[11] In certain circumstances, a defendant's notice of appeal alone can result in a broader remedy than the one the defendant expressly sought. For example, if a defendant successfully attacks some, but not all, of the counts of conviction or a multi-count indictment, the court of appeals may vacate the entire sentence on all counts so that the district court can consider the overall consequences for its sentencing plan, and it may need to do so in order for the sentence as a whole to be sufficient to satisfy the sentencing factors in 18 U.S.C. 3553(a) (2000 & Supp. V 2005). As many courts of appeals have recognized, in that situation, a district court on remand may impose a sentence on the remaining counts that is longer than that imposed at the initial sentencing on those particular counts, as long as the aggregate sentence on remand is not longer than the original aggregate sentence. See, *e.g.*, *United States* v. *Pimienta-Redondo*, 874 F.2d 9, 12-16 (1st Cir.) (en banc), cert. denied, 493 U.S. 890 (1989); *United States* v. *Vasquez*, 85 F.3d 59, 61 (2d Cir. 1996); *United States* v. *Campbell*, 106 F.3d 64, 68 (5th Cir. 1997); *United States* v. *Mancari*, 914 F.2d 1014, 1018-1022 (7th Cir. 1990), cert. denied, 499 U.S. 924 (1991); *United States* v. *Bennett*, 363 F.3d 947, 955-956 (9th Cir.), cert. denied, 543 U.S. 950 (2004); *United States* v. *Hicks*, 146 F.3d 1198, 1201-1203 (10th Cir.), cert. denied, 525 U.S. 941 (1998); see also *United States* v. *Townsend*, 178 F.3d 558, 566-569 (D.C. Cir. 1999) (applying same principle after some, but not all, counts of conviction were vacated under 28 U.S.C. 2255). Those courts correctly reason that, when a defendant is found guilty on a multi-count indictment, the sentence imposed typically constitutes a package that takes into account "a 'breadth of information' to ensure that "the punishment 'will suit not merely the offense but the individual defendant.'" *Pimienta-Redondo*, 874 F.2d at 14 (quoting *United States* v. *Wasman*, 468 U.S. 559, 564 (1984)). That result, however, is not inconsistent with the conclusion that a court of appeals lacks jurisdiction to award relief to the government on a claim comprehended by Section 3742(b) when the government does not appeal. An appellate court's vacation of the entire

D. The Rule-Based Time Limitations For The Filing Of A Notice Of Appeal And Cross-Appeal Are Not Jurisdictional In Criminal Sentencing Appeals

Petitioner relies (Pet. 15-17) on this Court's decision in *Bowles* to suggest that the *time limitations* for taking a cross-appeal are jurisdictional. Although the *filing* of a notice of appeal by the government is necessary to vest jurisdiction in the court of appeals to correct sentencing errors that aggrieve the government, the *timing deadline* for the filing of such a notice of appeal or cross-appeal is not a jurisdictional requirement. Unlike Section 2107, which *Bowles* held establishes jurisdictional deadlines for the filing of initial appeals in civil cases, no statutory provision sets a time limitation on the filing of appeals, or cross-appeals, of sentences in criminal cases. Rather, for criminal sentencing appeals, the time limits for both initial notices of appeal and notices of cross-appeal are prescribed only by the Federal Rules of Appellate Procedure. See Fed. R. App. 4(b)(1).

As this Court observed in *Kontrick*, "'[i]t is axiomatic' that such rules [of procedure] 'do not create or withdraw federal jurisdiction.'" 540 U.S. at 453 (quoting *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 370 (1978)). *Kontrick* involved Federal Rule of Bankruptcy Procedure 4004(a), which provides that an objection to a debtor's discharge "shall be filed no later than 60 days after the first date set for the meeting of creditors." A creditor filed a timely objection, but he subsequently

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judgment when a defendant has obtained relief on one count does not award relief on a claim that falls within Section 3742(b); it simply permits the district court to conduct resentencing on a clean slate (a consequence that is implicitly authorized by the defendant's attack on one aspect of an interrelated sentencing package).

amended his filing (outside the time limit) to add a new objection. See *Kontrick*, 540 U.S. at 448-449. The debtor responded on the merits without noting the untimeliness of the new objection; only later did he raise the issue, arguing that the timing rule was "jurisdictional" and therefore a claim of untimeliness could not be forfeited. See *id.* at 450-451. This Court rejected that argument, holding that because Rule 4004 concededly did not affect the bankruptcy court's subject-matter jurisdiction, see *id.* at 454, it was merely an "inflexible claim-processing rule" that could "be forfeited if the party asserting the rule waits too long to raise the point," *id.* at 456.

This Court followed *Kontrick* in *Eberhart*, a case that involved Federal Rule of Criminal Procedure 33, which allows district courts to grant new trials but requires that "[a]ny motion for a new trial * * * must be filed within 7 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2). Eberhart filed an untimely new-trial motion, and the government responded on the merits without addressing the issue of timing. See *Eberhart*, 546 U.S. at 13-14. This Court held that the government had forfeited its objection to the untimeliness of the motion. See *id.* at 19. In so holding, it concluded that Rule 33 is not jurisdictional: "It is implausible that the Rules considered in *Kontrick* can be nonjurisdictional claim-processing rules, while virtually identical provisions of the Rules of Criminal Procedure can deprive federal courts of subject-matter jurisdiction." *Id.* at 16.

The principle of *Kontrick* and *Eberhart* governs the time limitations in Federal Rule of Appellate Procedure 4(b)(1) at issue here. Indeed, in *Bowles*, this Court distinguished the timing requirements in Section 2107 from

the timing rules in *Kontrick* and *Eberhart* on the very basis that the former was statutory and the latter were not. See *Bowles*, 127 S. Ct. at 2364-2365; see also U.S. Amicus Br. at 16 n.4, *Bowles*, *supra* (No. 06-5306) (noting that "[c]riminal appeals are different" from civil appeals because "no statute governs the timing of a defendant's notice of appeal in criminal cases"). And since this Court's decision in *Bowles*, several courts of appeals have held that the time limitations for criminal appeals are not jurisdictional. See *United States* v. *Garduño*, 506 F.3d 1287, 1290-1291 (10th Cir. 2007); *United States* v. *Martinez*, 496 F.3d 387, 388-389 (5th Cir.) (per curiam), cert. denied, 128 S. Ct. 728 (2007).[12]

E. The Court Need Not Decide The Distinct Question Whether A Cross-Appeal Is Necessary To Confer Jurisdiction Under 28 U.S.C. 1291 To Award Relief In Favor Of An Appellee Because Appellate Jurisdiction Here Is Governed And Limited By 18 U.S.C. 3742

As a matter of general appellate practice, this Court has long recognized "two linked principles governing the consequences of an appellee's failure to cross-appeal." *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479 (1999). In the absence of a cross-appeal, "an appellee may 'urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court,' but may

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[12] In contrast to the absence of statutory time limitations with respect to sentencing appeals, Congress has prescribed a statutory deadline with respect to certain government appeals in criminal cases not at issue here. See 18 U.S.C. 3731 (2000 & Supp. V 2005) (providing that "all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted"). Under this Court's decision in *Bowles*, that limitation is jurisdictional.

not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *Ibid.* (citation omitted).

This Court applied that rule in *Neztsosie* in the context of an interlocutory appeal in a civil case. In that case, the district court had entered an order granting in part and denying in part an injunction sought by various companies that had been sued in multiple tribal courts. In particular, the district court, relying on the doctrine of tribal-court exhaustion, denied the companies' requests for preliminary injunctions, "'except to the extent' that [the Tribal-Court plaintiffs] sought relief in the Tribal Courts under the Price-Anderson Act." *Neztsosie*, 526 U.S. at 478. The companies appealed, and the court of appeals affirmed the portion of the district court's order denying their request for preliminary injunctions. The court of appeals, however, also reversed the portion of the order enjoining the Tribal-Court plaintiffs from pursuing Price-Anderson Act claims in the Tribal Courts, even though those parties had not cross-appealed. *Id.* at 478-479. The court of appeals concluded that the significant interests in comity to the Tribal Courts warranted creating an exception to the requirement for a cross-appeal. *Id.* at 478.

This Court disagreed. *Neztsosie*, 526 U.S. at 479-480. The Court noted that the court of appeals apparently viewed the cross-appeal requirement as "a 'rule of practice,' subject to exceptions, not an unqualified limit on the power of appellate courts." *Id.* at 480. Although presented with arguments that the rule was "an unqualified bound on the jurisdiction of the courts of appeals," this Court declined to decide that question: "[w]e need not decide the theoretical status of such a firmly entrenched rule, however, for even if it is not strictly juris-

dictional * * * the 'comity considerations' invoked by the Court of Appeals to justify relaxing it are clearly inadequate to defeat the institutional interests in fair notice and repose that the rule advances." *Ibid.*[13]

The Court has even less need to decide the question left open in *Neztsosie* here than in *Neztsosie* itself. Appellate jurisdiction in *Neztsosie* was governed by 28 U.S.C. 1292(a)(1), which grants jurisdiction to courts of appeals over certain classes of interlocutory orders. See *ibid.* That provision, like the principal statute governing appellate jurisdiction, 28 U.S.C. 1291, grants jurisdiction over a broadly defined class of cases. See *ibid.* (providing that the "court of appeals * * * shall have jurisdiction from all final decisions of the district courts * * * except where a direct review may be had in the Supreme Court"). See also 28 U.S.C. 2107(a) ("no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days").[14] In contrast, jurisdiction over sentencing appeals is defined and delimited not by 28 U.S.C. 1291, but by the special jurisdictional provision

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[13] In *Neztsosie*, the United States as amicus curiae contended that the cross-appeal requirement was jurisdictional in nature. See 526 U.S. at 480; U.S. Amicus Br. at 20-22, *Neztsosie*, *supra* (No. 98-6). But the government in *Neztsosie* did not have the benefit of the Court's recent decisions holding that non-statutorily based timing requirements are not jurisdictional in the strict sense. See U.S. Amicus Br. at 9 n.2, 16 n.4, *Bowles*, *supra* (No. 06-5306).

[14] See also 28 U.S.C. 2106 ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.").

for sentencing appeals, 18 U.S.C. 3742 (2000 & Supp. V 2005). See *Ruiz*, 536 U.S. at 626-628. The question here turns on whether Section 3742 requires the government to file its own notice of appeal (or cross-appeal) to vest courts of appeals with jurisdiction to correct sentencing errors that aggrieve the government. For the reasons explained above, Section 3742 does have jurisdictional force, and the absence of a notice of appeal filed by the government meant that the court of appeals had no jurisdiction to correct sentencing errors that aggrieved the government.

II. EVEN IF THE FILING OF A NOTICE OF APPEAL BY THE GOVERNMENT IS NOT A JURISDICTIONAL PREREQUISITE IN A SENTENCING APPEAL, THE FILING OF A TIMELY NOTICE OF CROSS-APPEAL IS A MANDATORY CLAIM-PROCESSING RULE THAT MUST BE ENFORCED WHEN IT IS PROPERLY INVOKED

Even if the Court concludes that a defendant's notice of appeal of his sentence vests the court of appeals with jurisdiction to review errors in a sentence that aggrieved the government, the court of appeals erred in modifying the judgment in favor of the government in the absence of a cross-appeal. At a minimum, the requirement of a cross-appeal is a mandatory claim-processing rule that must be enforced where, as here, the appellant invokes the rule in a timely fashion. This Court has never recognized an exception to that inveterate rule, and none is justified here.

A. Both The Need For A Cross-Appeal And The Deadlines For Filing One Are Mandatory Requirements

1. Although the Court in *Neztsosie* left open whether the cross-appeal requirement is "strictly jurisdictional," see pp. 26-28, *supra*, the Court's language

and reasoning emphasized the mandatory nature of the rule. In holding that the court of appeals had erred in recognizing an exception to that rule, the Court described the rule as "firmly entrenched" and "inveterate and certain," observing that the Court had "repeatedly expressed" the requirement in "emphatic terms." *Neztsosie*, 526 U.S. at 479-481 & n.3 (quoting *Morley Constr. Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 191 (1937)). In addition, the Court stressed the long-standing, unqualified nature of the requirement. The Court explained that by 1796 it had recognized that a cross-appeal is required to obtain expanded relief. *Id.* at 479 (citing *McDonough* v. *Dannery*, 3 U.S. (3 Dall.) 188, 198 (1796)). And "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of [the Court's] holdings has ever recognized an exception to the rule." *Id.* at 480.

Sixty years before *Neztsosie*, the Court likewise reversed a court of appeals' modification of a judgment in favor of a nonappealing party. See *Morley*, 300 U.S. at 185. In *Morley*, the district court rejected a surety's request for specific performance of its agreement with a contractor, but granted the surety relief on its equitable exoneration claim. *Id.* at 189. On the contractor's appeal, and in the absence of a cross-appeal by the surety, the court of appeals expressed doubts about the merits of the surety's exoneration claim but remanded to the district court to modify its decree to award the surety specific performance. *Id.* at 190.

For the Court, the case turned on "[t]he power of an appellate court to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal." *Morley*, 300 U.S. at 187. In resolving that question, the Court left little doubt that appellate courts have no such

power: although an appellee may defend a judgment on any ground in the record, even if it "involve[s] an attack upon the reasoning of the lower court," "[w]hat [an appellee] may not do in the absence of a cross-appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.' * * * The rule is inveterate and certain." *Id.* at 191 (quoting *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924)). Although the Court noted that the line between defending a judgment and seeking to modify it is not always sharply defined, *ibid.*, it held that the court of appeals had provided the surety with "a new measure of relief," which it was not "at liberty" to do in the absence of a cross-appeal by the surety. *Id.* at 193.

The holdings in *Neztsosie* and *Morley* are consistent with cases in which the Court has "repeatedly expressed the [cross-appeal] rule in emphatic terms," both with respect to review in this Court and in the courts of appeals. *Neztsosie*, 526 U.S. at 481 n.3 (citing cases). Indeed, as early as 1864, this Court described the rule as "settled" that "a party not appealing cannot take advantage of an error in the decree committed against himself," and the Court refused to correct an acknowledged error. *Chittenden* v. *Brewster*, 69 U.S. (2 Wall.) 191, 196 (1865) ("If the appellees desired to avail themselves of this error in the decree, they should have brought a cross appeal."); see, *e.g.*, *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364-365 (1994) ("A cross-petition is required * * * when the respondent seeks to alter the judgment below."); *Alexander* v. *Cosden Pipe Line Co.*, 290 U.S. 484, 487 (1934) ("The defendant alone petitioned for a review here. In this situation the plaintiff is not entitled to be heard in opposition to

the parts of the decision of the Court of Appeals which were adverse to it."); *American Ry. Express Co.*, 265 U.S. at 435; *The Maria Martin*, 79 U.S. (12 Wall.) 31, 40-41 (1871) ("[W]here only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken."); *McDonough*, 3 U.S. (3 Dall.) at 198.

Although the Court in *Neztsosie* acknowledged that this Court had, in a few cases, "made statements in dictum that might be taken to suggest the possibility of exceptions to the rule," see *Neztsosie*, 526 U.S. at 480-481 n.3 (citing cases), it emphasized that none of those decisions had actually recognized an exception.[15] For example, in *Langnes* v. *Green*, 282 U.S. 531 (1931), the Court stated that the requirement to file a cross-petition, if a respondent seeks to enlarge the relief obtained below, is a rule of practice that this Court need not follow "if the court deems there is good reason to do so." *Id.* at 538. But, as the Court in *Langnes* explained, it was "not necessary to consider this rule of practice because the respondent offers no objection to the decree," but merely seeks to present alternative arguments "to sustain it." *Ibid.* Furthermore, the Court's statement in *Langnes* was premised on the Court not having previously denied in express terms "the *power* of the court to review objections urged by [a] respondent" who did not cross-petition. *Ibid.* As discussed above, however, that is the specific question (in the context of a cross-appeal)

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[15] As the Court explained, all but one of those cited statements concerned the related issue of the filing of a cross-petition for review in the Supreme Court, rather than "statements concerning the power of the courts of appeals." *Neztsosie*, 526 U.S. at 480 n.3.

that the Court took up six years later in *Morley*, where it did expressly hold that appellate courts lack "[t]he power * * * to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal." 300 U.S. at 187.

2. In addition to this Court's longstanding articulation of the mandatory and inflexible nature of the filing of a cross-appeal in order for an appellee to increase its rights, the Federal Rules prescribe rigid time limitations on the filing of such a notice. In criminal cases, if a defendant has filed a notice of appeal, the government must file its notice of cross-appeal within 30 days after "the filing of a notice of appeal by any defendant" (or within 30 days of the judgment or order being appealed, whichever is later). Fed. R. App. P. 4(b)(1)(B); see Fed. R. App. P. 28.1(b) (providing that, in cross-appeals, the "party who files a notice of appeal first is the appellant").[16] That time period may only be extended by the district court "[u]pon a finding of excusable neglect or good cause," and only for "a period not to exceed 30 days from the expiration of the time otherwise prescribed." See Fed. R. App. P. 4(b)(4); Fed. R. App. P. 26(b)(1) (providing that the court may not extend the time to file "a notice of appeal (except as authorized in Rule 4)").

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[16] The rule for cross-appeals in civil cases is similar. See Fed. R. App. P. 4(a)(3) ("If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period is later.").

B. Under This Court's Cases, Both The Filing Of A Cross-Appeal And The Filing Of A Timely Cross-Appeal Are Inflexible Rules That Must Be Enforced If Properly Asserted

This Court's cases considering the nature of claim-processing rules demonstrate that the cross-appeal requirement itself, as well as the relevant rule-based time limitations, are mandatory claim-processing rules. In both criminal and civil cases, this Court has repeatedly emphasized the inflexible, mandatory nature of claim-processing rules, recognizing that courts have a duty to enforce them when they are properly invoked.

1. In *Carlisle* v. *United States*, 517 U.S. 416 (1996), this Court addressed "whether a district court has authority to grant a postverdict motion for judgment of acquittal filed one day outside the time limit prescribed by Federal Rule of Criminal Procedure 29(c)." *Id.* at 417-418. This Court answered that question in the negative. The Court observed that the governing rules were "plain and unambiguous." *Id.* at 421. The Court thus concluded that there was "simply no room" in the text of the rules for the granting of an untimely motion for judgment of acquittal, "regardless of whether the motion is accompanied by a claim of legal innocence, is filed before sentencing, or was filed late because of attorney error." *Ibid.*

The Court in *Carlisle* also rejected the argument that, despite the fact that the motion was untimely under the federal rules, the district court could *sua sponte* enter a judgment of acquittal. The Court refused to decouple the time limits from a court's authority to rule on an issue: "'[i]t would be a strange rule' * * * 'which deprived a judge of power to do what was asked when request was made by the person most concerned, and

yet allowed him to act without petition.'" *Carlisle*, 517 U.S. at 422 (quoting *United States* v. *Smith*, 331 U.S. 469, 474 (1947)); *Smith*, 331 U.S. at 475 ("We think that expiration of the time within which relief can openly be asked of the judge, terminates the time within which it can properly be granted on the court's own initiative."). The Court also rejected an effort to rely on the inherent supervisory power of courts, observing that, "[w]hatever the scope of [a court's] 'inherent power,' * * * it does not include the power to develop rules that circumvent or conflict with the Federal Rules." *Carlisle*, 517 U.S. at 426.

Similarly, in *United States* v. *Robinson*, 361 U.S. 220 (1960), this Court strictly enforced the rule-based time limitation for filing a notice of appeal in a criminal case. In so doing, the Court described the limitation as "mandatory and jurisdictional." *Id.* at 224. The Court concluded that the period could not be extended, "regardless of excuse," because the rules provided that the courts could not enlarge the time for taking an appeal. *Id.* at 229-230. The Court therefore held that the court of appeals lacked authority to hear the untimely appeal. *Ibid.*

Although this Court's subsequent decisions in *Bowles*, *Kontrick*, and *Eberhart*, cast doubt on *Robinson*'s use of the term "jurisdictional" in the context of purely rule-based limitations, those cases confirm the *mandatory* nature of claim-processing rules. "[T]he central point of the *Robinson* case" remains valid: "when the Government objected to a filing untimely under the [applicable rule], the court's duty to dismiss the appeal was mandatory." *Eberhart*, 546 U.S. at 18. As *Eberhart* explained, courts "must observe the clear limits" of the Federal Rules "when they are properly in-

voked." *Id.* at 17. "These claim-processing rules thus assure relief to a party properly raising them, but do not compel the same result if the party forfeits them." *Id.* at 19; see *Kontrick*, 540 U.S. at 456-457.

2. The same analysis applies here as in *Carlisle* and *Robinson*. The rule that a court of appeals lacks authority to enlarge a judgment in the absence of a cross-appeal is an "inveterate and certain" one that this Court has repeatedly expressed in "emphatic terms" and has applied without exception for over two hundred years. *Neztsosie*, 526 U.S. at 479-481 & n.3 (quoting *Morley*, 300 U.S. at 191). Moreover, the Federal Rule provision governing the timing of a notice of cross-appeal in criminal cases is "plain and unambiguous." See *Carlisle*, 517 U.S. at 421. The time period provided cannot be extended for more than "30 days from the expiration of the time otherwise prescribed by this Rule 4(b)"—a time that has long since passed. Fed. R. App. 4(b)(1) and (4). These rules leave no room for creating a judicial exception. Nor do they permit a court of appeals to *sua sponte* notice an error and grant the same relief that it could if a party had made a timely cross-appeal. As this Court recognized in *Carlisle* and *Smith*, it would be odd for a court to have *sua sponte* authority, when the rules would mandate the denial of a motion for an extension of time to file a cross-appeal. *Carlisle*, 517 U.S. at 422; *Smith*, 331 U.S. at 474-475. Indeed, the rules expressly contemplate *sua sponte* extensions of time, but those too are limited to the 30-day window. See Fed. R. App. 4(b)(1) and (4).

Moreover, like other claim-processing rules, the cross-appeal requirement and the time limitations for complying with it are "meant to protect institutional interests in the orderly functioning of the judicial sys-

tem, by putting opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not." *Neztsosie*, 526 U.S. at 481-482; see *Eberhart*, 546 U.S. at 13, 19. These requirements have significant practical consequences. If a timely cross-appeal is filed, it puts the initial appellant on notice that if he continues to pursue his appeal, he is at risk of having the judgment against him expanded. In both civil and criminal cases, that knowledge can lead to settlement of the competing appeals. In addition, the deadlines ensure that the initial appellant is aware, before he files his opening brief and chooses the full nature of his arguments, whether the other party also intends to challenge a portion of the judgment. In this case, petitioner may well have pursued his appeal differently, or abandoned it altogether, if he had known within 30 days of filing his notice of appeal that he risked a fifteen-year increase in his already lengthy sentence.

C. Petitioner Is Entitled To Application Of The Cross-Appeal Requirement

As discussed above, the cross-appeal requirement is mandatory unless waived or forfeited by the party it would benefit. Here, petitioner timely raised the issue. The government had not appealed or cross-appealed, nor had it argued for an increase in petitioner's sentence in its brief or at oral argument. See p. 5 & note 2, *supra*. It was only after the court of appeals issued its opinion that petitioner had reason to raise the issue, which he did in a petition for rehearing.[17] There, petitioner argued that "[b]ecause the government did not raise an

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[17] Although petitioner missed the initial deadline for filing his rehearing petition, the court of appeals granted him leave to file out of time. Pet. App. 27a.

appeal or cross-appeal, [his] sentence should have been left alone." J.A. 95-96. Although petitioner did not extensively develop the argument, he supported it with citation to the Seventh Circuit's decision in *Rivera*, 411 F.3d at 867, where the court, relying on *Neztsosie*, held that the cross-appeal requirement is mandatory, and he asked the court of appeals "to take the same route as *Rivera*." J.A. 95.

If petitioner were alleging error in the district court proceedings, a mere assertion of a claim and citation of a case would not be sufficient to require a court of appeals to address it, see, *e.g.*, *United States* v. *Reed*, 167 F.3d 984, 993 (6th Cir. 1999) (The settled appellate rule is that "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (quoting *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir.), cert. denied, 494 U.S. 1082 (1990)). But here, the court of appeals itself had determined to increase his sentence *sua sponte* and had examined its authority to do so and cited the contrary authority in *Rivera*. Pet. App. 9a-10a n.5. In that context, petitioner's objection provided a sufficient basis to alert the court of appeals to his reliance on the general rule of practice against modification of a judgment in favor of a party that had not cross-appealed. Because petitioner did not waive or forfeit the argument against increasing his sentence absent a cross-appeal by the government, the court of appeals was obligated to enforce the rule and simply affirm his conviction and sentence, rather than remand with directions to increase it.

D. There Is No Sound Basis For Recognizing An Exception To The Cross-Appeal Requirement In This Case

Even assuming that the cross-appeal requirement is not strictly jurisdictional and that sufficiently extraordinary circumstances might justify an exception to the cross-appeal requirement and its time limitations, there is no warrant for recognizing such an exception in this case.

1. Federal Rule of Criminal Procedure 52(b) does not create an exception to the cross-appeal requirement

The court of appeals erred in concluding that Federal Rule of Criminal Procedure 52(b) granted it authority to increase petitioner's sentence in the absence of a cross-appeal by the government. Pet. App. 9a & n.5. Nothing in the language or history of Rule 52(b) purports to address, let alone create an exception to, the cross-appeal requirement. Such a novel interpretation would effectively create a blanket plain-error exception to the cross-appeal requirement in criminal cases, a result that is nowhere suggested in, and would be contrary to, this Court's decisions. See, *e.g*, *Neztsosie*, 526 U.S. at 480 ("Indeed, in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule."); *Strunk* v. *United States*, 412 U.S. 434, 436-437 (1973) ("On this record, it seems clear that petitioner was responsible for a large part of the 10-month delay which occurred and that he neither showed nor claimed that the preparation of his defense was prejudiced by reason of the delay. * * * However, in the absence of a cross-petition for certiorari, questioning the holding that petitioner was denied a speedy trial, the only ques-

tion properly before us for review is the propriety of the remedy.").

As a general matter, the adversary system contemplates that the parties will frame the issues for decision and the courts will function as neutral adjudicators of the matters presented. Departures from that model in which the appellate courts review the record and formulate their own issues for parties who do not appeal should be the rare exception to that rule. To the extent that courts may depart from the pure adversary model in the criminal justice system, the justification has usually been to protect a *pro se* litigant's rights. See *Castro* v. *United States*, 540 U.S. 375, 381-383 (2003). But as a general rule, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Id.* at 386 (Scalia, J., joined by Thomas, J., concurring) ("I am frankly not enamored of any departure from our traditional adversarial principles."). Nothing in Rule 52(b) can be read to displace that principle, especially against the well-established rule against awarding relief in favor of an appellee who has not cross-appealed.[18]

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[18] The Court has held that "district courts are permitted, but not obliged, to consider *sua sponte*, the timeliness of a state prisoner's habeas petition." *Day* v. *McDonough*, 547 U.S. 198, 209 (2006). That action, however, does not inject a new legal basis for relief into the case that the aggrieved party did not raise. Moreover, *Day* permits a district court to raise an issue *sua sponte* that the State itself could raise by motion if the court invited such action. *Ibid.* Here, the time for filing a cross-appeal had long passed, and appellate courts are not in the habit of inviting the parties to take appeals that they have knowingly waived. In addition, *Day* conditioned such *sua sponte* action on "acccord[ing] the parties fair notice and an opportunity to present their positions," *id.* at 210; here, the court of appeals did not do so. Finally, *Day* noted that

The court of appeals cited this Court's decision in *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam), in support of its application of plain-error review. Although *Silber* supports an appellate court's discretion to recognize a plain error that has not been pressed by a party, it does not support a court's authority to do so in the absence of an appeal or cross-appeal by the party harmed by that error. Rather, the decision was rendered on Silber's petition for a writ of certiorari, and Silber sought by that petition to have his conviction reversed. See Pet. Br., *Silber*, *supra* (No. 454). More generally, we are aware of no case in which the Court has granted relief to a party based on a finding of plain error when that party did not file a petition or cross-petition with the Court. At most, this Court has "suggested in passing that there might be occasions when, in a criminal case, the Court might address a *constitutional* issue resolved in favor of a petitioner and not raised in a cross-petition for certiorari." See *Neztsosie*, 526 U.S. at 480 n.3 (emphasis added) (describing dicta in *Strunk*, 412 U.S. at 437). Here, of course, the error is not one of constitutional dimension.[19]

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other factors bore on the district court's exercise of discretion, including prejudice to the habeas petitioner from the court's raising the limitations issue *sua sponte*. *Ibid.* Here, if petitioner had been made aware of the prospect that his own appeal could have resulted in *increasing* his sentence, he may have withdrawn it altogether.

[19] It is true that, in criminal cases, this Court has waived its rules governing the timing of petitions on the ground that "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht* v. *United States*, 398 U.S. 58, 64 (1970); see *Bowles*, 127 S. Ct. at 2365 (recognizing same). But waiving the timing deadline is a far cry from waiving the requirement that a party file a petition *at all*.

2. Sound policy reasons counsel against permitting district courts to increase sentences absent a government cross-appeal

Nor should this Court recognize an exception to the cross-appeal requirement in this case, whether under the rubric of Rule 52(b) or otherwise. Congress expressly assigned to specific high-ranking officials within the Department of Justice the responsibility for determining whether the government, on behalf of the public, should pursue a sentencing appeal. See 18 U.S.C. 3742(b) (requiring "the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General" for the prosecution of any government sentencing appeal). Congress thus entrusted the Executive Branch, not the courts, with the discretion to determine whether to seek the correction of sentencing errors that harmed the government. See S. Rep. No. 225, *supra*, at 151, 153 (recognizing that the government serves as the representative of the public in deciding whether to appeal a sentence). In so doing, Congress necessarily understood that, as a result of the government's exercise of its prosecutorial discretion whether to pursue an appeal, not all sentencing errors would be corrected.

As with other exercises of prosecutorial discretion, the government's decision not to pursue a greater sentence through appeal often will "involve[] a complicated balancing of a number of factors" that the Executive "is far better equipped than the courts" to evaluate. *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). The Executive's advantages accrue not only from institutional competence to weigh those factors, but also from constitutional function. See *id.* at 832 (noting prosecutorial decisions have "long been regarded as the special province of the

Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed'") (quoting U.S. Const. Art. II, § 3); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.").

That is no less true at the appellate stage than at the trial or charging stage. Indeed, Section 3742(b) expressly contemplates the exercise of discretion by the Executive Branch at some point after conviction and sentencing, but before prosecution of an appeal. This Court has recognized the legitimacy of, and significant interests promoted by, the Solicitor General's role in deciding which appeals and petitions for writs of certiorari the government will pursue. See, *e.g.*, *NRA Political Victory Fund*, 513 U.S. at 96; *United States* v. *Providence Journal Co.*, 485 U.S. 693, 702-703 n.7 (1988); *United States* v. *Mendoza*, 464 U.S. 154, 160-161 (1984). That determination, which often involves "divers reasons unrelated to the merits of a decision," *Andres* v. *United States*, 333 U.S. 740, 765 n.9 (1948) (Frankfurter, J., concurring), is not well suited to second-guessing by the courts.

Sentencing appeals may implicate precisely the sorts of interests that are best balanced by the Executive. Even if a particular sentence is judged erroneous, it may require an undue commitment of scarce criminal justice resources or appellate risk to seek to correct it on appeal. And a remand for resentencing is not cost free. Ordinarily, a defendant must be transported back to the court, temporarily disrupting his imprisonment and requiring the marshals to devote resources to the task. Once back in court, a defendant may take advantage of

a resentencing to seek to reopen previously settled issues or to raise new ones. Particularly in the changing and uncertain sentencing environment created by *United States* v. *Booker*, 543 U.S. 220 (2005), the ultimate outcome of a resentencing proceeding may be unpredictable and not necessarily favorable to the government. The government may therefore elect to opt for finality rather than to extract the highest possible sentence that might be obtained from an appeal.

3. Although the government has "substantial rights" under Rule 52(b), the decision whether to vindicate those rights belongs to the government

a. Petitioner contends (Pet. Br. 32-34; Pet. 12-13, 19-20) that the government can never obtain relief under Rule 52(b) because the government has no "substantial rights" within the meaning of the Rule. But Rule 52(b) is not by its terms limited to claims by defendants. See Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). Moreover, the argument that the government has no "substantial rights" is irreconcilable with the fact that subparagraphs (a) and (b) of Rule 52 both condition the granting of relief on whether the error affected "substantial rights." See Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). As this Court explained in *United States* v. *Olano*, 507 U.S. 725 (1993), that language involves the same inquiry under both subsections, the only difference is which party bears the burden of establishing the requisite effect on "substantial rights." *Id.* at 734-735; see *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2417 (2007) ("A standard principle

of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."). Accordingly, petitioner's reading of "substantial rights" would mean that the government not only could never obtain relief for forfeited errors, but that it also could never obtain relief for preserved errors. If the government has no "substantial rights," any and all errors harmful to the government's interests "must be disregarded" under Rule 52(a) because they by definition do not "affect substantial rights." Fed. R. Crim. P. 52(a). Nothing in the law or reason supports that view.

Further, every court of appeals to have addressed the issue has recognized that the government may obtain relief for sentencing errors under Rule 52(b). See, *e.g.*, *United States* v. *Rodriguez*, 938 F.2d 319, 321-322 (1st Cir. 1991); *United States* v. *Gordon*, 291 F.3d 181, 193-194 (2d Cir. 2002), cert. denied, 537 U.S. 1114 (2003); *United States* v. *Dickerson*, 381 F.3d 251, 257 (3d Cir. 2004); *United States* v. *Perkins*, 108 F.3d 512, 517 (4th Cir. 1997); *United States* v. *Barajas-Nunez*, 91 F.3d 826, 830, 833 (6th Cir. 1996); *United States* v. *Barnett*, 410 F.3d 1048, 1050-1051 (8th Cir. 2005); *United States* v. *Moyer*, 282 F.3d 1311, 1319 (10th Cir. 2002); *United States* v. *Clark*, 274 F.3d 1325, 1326, 1328-1330 (11th Cir. 2001); *United States* v. *Edelin*, 996 F.2d 1238, 1244-1245 (D.C. Cir. 1993) (per curiam), cert. denied, 510 U.S. 1078 (1994); see also *United States* v. *Castillo*, 386 F.3d 632, 637-638 (5th Cir.) (recognizing availability of plain-error review for claims forfeited by the government, but holding that the claim failed under the fourth prong), cert. denied, 543 U.S. 1029 (2004); *United States* v. *Vieke*, 348 F.3d 811, 813-814 (9th Cir. 2003) (recognizing that "an erroneous sentence may be reviewed for plain error,"

but rejecting claim); *United States* v. *Jackson*, 207 F.3d 910, 917 (7th Cir.) ("while it is unusual for the government to be arguing plain error in a criminal case, there is nothing to prevent its doing so"), vacated on other grounds, 531 U.S. 953 (2000).

The cases cited by petitioner (Pet. 13) are not to the contrary. See *United States* v. *Filker*, 972 F.2d 240, 242 (8th Cir. 1992); *United States* v. *Posters 'N' Things Ltd.*, 969 F.2d 652, 662-663 (8th Cir. 1992), aff'd in different part, 511 U.S. 513 (1994); *United States* v. *Garcia-Pillado*, 898 F.2d 36, 39-40 (5th Cir. 1990). None of those cases, all of which pre-date *Olano*, *supra*, decides whether the government has "substantial rights" under Rule 52(b). Instead, they each reviewed the government's forfeited claim under a then-existing general standard of "manifest injustice," *Garcia-Pillado*, 898 F.2d at 39, "miscarriage of justice," *Posters 'N' Things*, 969 F.2d at 663, or "gross miscarriage of justice," *Filker*, 972 F.2d at 242. And as the Circuits that issued those decisions have recognized, the *Olano* standard has supplanted the analysis in those cases. See, *e.g.*, *Barnett*, 410 F.3d at 1051; *Castillo*, 386 F.3d at 637. Moreover, even under the standards applied, those courts did not purport to establish categorical rules that the government could not obtain relief on a forfeited sentencing claim, but instead simply applied the then-applicable standard to the facts before them. See, *e.g.*, *Filker*, 972 F.2d at 242 (noting sentence difference was only fifteen months and that district court might impose same sentence on remand); *Garcia-Pillado*, 898 F.2d at 37, 39 (noting that sentencing difference was limited to six months in deciding "under the circumstances of this case" that sentence was affirmed); see also *Barnett*, 410 F.3d at 1051 ("Furthermore, the sentencing errors up-

held in *Filker* and *Posters 'N' Things* * * * pale in comparison to the five year disparity at issue here.").

b. Although the government has substantial rights within the meaning of Rule 52(b), and the failure to accord the government those rights under sentencing statutes may seriously affect the fairness, integrity, and public reputation of judicial proceedings, *Johnson* v. *United States*, 520 U.S. 461, 469-470 (1997), the government is fully capable of determining whether to seek to vindicate its rights. The mandatory nature of Section 924(c)'s penalties does not divest the government of its discretion over the decision whether to appeal. Although Congress prescribed a mandatory minimum sentence for a second Section 924(c) conviction such as petitioner's, see 18 U.S.C. 924(c)(1)(C) and (2), Congress statutorily assigned to the Executive Branch the discretion to decide whether to appeal a sentence that "was imposed in violation of [that] law." 18 U.S.C. 3742(b). The Executive Branch is institutionally best suited to determine, and fully capable of determining, whether the incremental benefit in seeking to enforce the full extent of Section 924(c)'s penalties in a particular case warrants the investment of resources in an appeal and resentencing. A conclusion that the public interest is best served by devoting judicial and prosecutorial resources to new cases, rather than seeking to increase sentences (often only marginally) in old ones, is entitled to respect from the appellate courts. There is no warrant in this situation for creating an unprecedented exception to the mandatory and inflexible rules requiring the notice of a timely cross-appeal.

CONCLUSION

The judgment of the court of appeals should be reversed in part, and the case remanded for re-imposition of the original sentence.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3731 (2000 & Supp. V 2005) provides:

Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

2. 18 U.S.C. 3742 (2000 & Supp. V 2005) provides:

Review of a sentence

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)[1] than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

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[1] See references in text note below.

(d) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, hav-

ing regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) DECISION AND DISPOSITION.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable de-

gree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) SENTENCING UPON REMAND.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) APPLICATION TO A SENTENCE BY A MAGISTRATE JUDGE.—An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) GUIDELINE NOT EXPRESSED AS A RANGE.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) DEFINITIONS.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

3. 28 U.S.C. 1291 provides:

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

4. 28 U.S.C. 1292 provides:

Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Is-

lands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit

may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this

subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

5. 28 U.S.C. 2107 provides:

Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

6. Rule 4 of the Federal Rules of Appellate Procedure provides:

Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) **Multiple Appeals.** If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

• the judgment or order is set forth on a separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judg-

ment or order—is treated as filed on the date of and after the entry.

(3) **Effect of a Motion on a Notice of Appeal.**

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A)

(4) **Motion for Extension of Time.** Upon a finding of excusable neglect or good cause, the district court

may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a

notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

7. Rule 26 of the Federal Rules of Appellate Procedure provides:

Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

(3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or—if the act to be done is filing a paper in court—a day on which the

weather or other conditions make the clerk's office inaccessible.

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

8. Rule 52 of the Federal Rules of Criminal Procedure provides:

Harmless and Plain Error

(a) HARMLESS ERROR. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

REPLY BRIEF

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No. 07-330

In the Supreme Court of the United States

MICHAEL J. GREENLAW, AKA MIKEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 07-330

MICHAEL J. GREENLAW, AKA MIKEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The amicus curiae appointed by this Court offers two central submissions in support of the contention that the court of appeals correctly increased petitioner's sentence, despite the absence of a government appeal or cross-appeal challenging his sentence. Each of those submissions is flawed.

First, amicus submits (Br. 5-7) that the statute governing sentencing appeals, 18 U.S.C. 3742 (2000 & Supp. V 2005), by using the word "shall" in its remedial provisions, *requires* a court of appeals to determine whether a sentence was "imposed in violation of law," and to remand for correction of any such error, whenever *any* party on appeal challenges the sentence. But amicus places far too much weight on the word "shall," and the text of Section 3742 does not support amicus's claim that this section overrides normal principles of appellate jurisdiction and review. The far better reading of the text

indicates that Congress adopted, in 18 U.S.C. 3742(a) and (b), restrictions on appellate power to correct sentencing errors that require *the aggrieved party*—the government or the defendant—to notice an appeal in order for the court to have jurisdiction over issues aggrieving that party. See U.S. Br. 13-23.

Second, amicus invites this Court more broadly to recognize a wide-ranging freedom for appellate courts to dispense with the bar on modifying a judgment in favor of a non-appealing appellee and to grant such relief whenever the court of appeals "ha[s] 'good reason' to deviate from the rule in th[e] [particular] case," after weighing a variety of factors. Br. 36 & n.14 (citation omitted). But in *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479-481 (1999), this Court emphatically stated that the rule against the award of relief in favor of a non-appealing party is "firmly entrenched," "inveterate and certain," and without recognized exception in more than two centuries of jurisprudence. The rule and its purposes are fully implicated in the context of this case. Indeed, recognition of an exception for plain sentencing errors that harm the government would circumvent Congress's decision to vest in a limited set of high-ranking Justice Department officials the authority to make the determination whether to challenge a sentencing ruling in the court of appeals.

Amicus's various other contentions, including his reliance on supervisory power under 28 U.S.C. 2106, the plain-error provision in Federal Rule of Criminal Procedure 52(b), and the mandatory nature of sentencing under 18 U.S.C. 924(c) (2000 & Supp. V 2005), see Br. 8-9, all fail to overcome the fundamental point that the government did not invoke the court of appeals' power to address the district court's sentencing error. Appellate

courts need not and should not adopt a roving authority to reverse sentencing errors when the aggrieved party has not appealed.

I. THE COURT OF APPEALS LACKED JURISDICTION TO ORDER AN INCREASE IN THE SENTENCE IN THE ABSENCE OF A NOTICE OF APPEAL BY THE GOVERNMENT UNDER SECTION 3742

A. Section 3742's Standard-Of-Review And Remedial Provisions Do Not Answer The Jurisdictional Question

Amicus argues that, once a defendant appeals his sentence, 18 U.S.C. 3742 "mandates" the court of appeals to consider "any" illegality in the sentence and remand "any illegal sentence regardless of whether the remand hurts or helps the appealing party." Amicus Br. 9; see *id.* at 9-26. Amicus bases (Br. 10-12) this purported mandatory obligation on Congress's use of "shall" in the standard-of-review and remedial provisions of Section 3742, subsections (e) and (f).[1]

Both subsections (e) and (f), however, address the action that a court should take *if* it has jurisdiction over a claim. Subsection (e) begins by noting what the court should do "[u]pon review of the record," and subsection (f) refers to what the court should do "[i]f the court of

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[1] *United States* v. *Booker*, 543 U.S. 220, 259-262 (2005), purported to excise subsection (e) in its entirety, and one member of the Court has suggested that the "inextricably intertwined" provisions of subsection (f) similarly must be severed, *Rita* v. *United States*, 127 S. Ct. 2456, 2483 (2007) (Scalia, J., concurring). Cf. Amicus Br. 10 n.2. Even if those provisions survive (or would, if severed, nevertheless inform the meaning of subsections (a) and (b) of Section 3742), nothing in them casts doubt on Congress's jurisdictional scheme that required separate appeals by the defendant and the government in order to place before the appellate court an issue aggrieving the particular party.

appeals" makes specified determinations. Each of those directions logically depends on the antecedent issue of what claims the court has jurisdiction to review and determine. That question is addressed not in the remedial subsections, but in the earlier subsections (a) and (b) that describe the claims that the defendant or the government may appeal.

If the review and remedial provisions have the meaning ascribed to them by amicus, they would impose on courts of appeals "an unequivocal mandate" (Amicus Br. 11 n.3) to scour the record in every criminal case in which either the defendant or the government appeals a sentence for any of the types of sentencing errors delineated in Section 3742(a) and (b), regardless of which party appealed and regardless of which errors that party chose to present to the court of appeals. This would be an extraordinary obligation to impose on courts of appeals, and a radical departure from normal appellate practice. Nothing in the statute suggests that Congress had such radical innovation in mind; to the contrary, the history of the statute and criminal appeals in general refute any such suggestion. See U.S. Br. 13-23.

Amicus attempts to avoid this logical implication of his textual argument, by focusing solely on appeals that allege "violation[s] of law" and on those violations that are "plainly" erroneous. See Amicus Br. 11 & n.3 (citation omitted). But under amicus's reading of the statute, there is no statutory basis for either limitation. Shall, after all, means shall. As to the first, subsection (e) is not limited to claims that the sentence was "imposed in violation of law." Subsection (e) contains the same mandatory language—"[u]pon review of the record, the court of appeals shall determine"—with re-

spect to every type of sentencing claim that can be raised by either the defendant or the government. Under amicus's reading of that "shall determine" clause, the court of appeals' duty would thus necessarily extend to determining whether the district court committed any errors that could have been appealed.

Similarly, there is no basis in the text of subsections (e) or (f) to limit the purported obligation to errors that are "plain." The language simply states that the court "shall determine whether the sentence," *e.g.*, "was imposed in violation of law," 18 U.S.C. 3742(e) (2000 & Supp. V 2005), and if the court so determines, it "shall remand" the case for further sentencing proceedings, 18 U.S.C. 3742(f) (Supp. V 2005). Neither subsection indicates that the sentencing error must be "plain" to trigger the court of appeals' supposed "unequivocal mandate." See Amicus Br. 11 n.3. Thus, amicus's reading of subsections (e) and (f) would impose exactly the burden on courts of appeals that he attempts to disavow, namely, "an obligation to independently research sentencing issues that are not raised by the parties." *Ibid.*

Amicus's felt need to attempt to pare back on the "mandatory" obligation he finds in the text of subsections (e) and (f) results from his insistence that those provisions do work that they were never designed to do. That a statute sets forth in mandatory terms what a court must do *if* issues are properly before it does not illuminate *whether* those issues are properly before it. Amicus's reading of the statute begs the essential question: whether subsections (a) and (b) of Section 3742 require that a party file a notice of appeal before the court of appeals has jurisdiction to correct an error that aggrieves that party. Jurisdiction is the threshold question; it is not conferred by provisions describing an ap-

pellate court's remedial authority. To the contrary, "[w]ithout jurisdiction the court cannot proceed at all in any cause." See, *e.g.*, *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)).[2]

B. The Text And Structure Of Section 3742(a) And (b) Demonstrate That Each Party Must File A Notice Of Appeal

Critically, amicus has no explanation for Congress's creation of two separate subsections—one for notices of appeal by the defendant and one for notices of appeal by the government. See 18 U.S.C. 3742(a) and (b). Instead, he simply asserts that the textual structure is "beside the point." Amicus Br. 14. But, as this Court has held, Section 3742(a)'s delineation of the grounds for a defendant's appeal is jurisdictional, *United States* v.

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[2] Amicus makes the same error in contending that only the initial notice of appeal, and not a notice of cross-appeal, has jurisdictional significance. Br. 27-28; see also *id.* at 34-36. Whatever the rule in cases governed by 28 U.S.C. 1291, the threshold question in this case is whether Section 3742(a) and (b) require separate, party-specific notices of appeal in order to invoke the jurisdiction of the court of appeals over sentencing errors that aggrieve that party. While amicus asserts (Br. 28) that "the court of appeals relied on the controlling principle that an appellate court with jurisdiction over the issues and the parties before it is not deprived of the authority to afford a specific measure of relief to a nonappealing party simply because that party did not file a cross-appeal," that assertion does nothing to answer the government's contention that Section 3742(a) and (b) in fact establish a *jurisdictional* dichotomy for sentencing errors, requiring the aggrieved party to appeal. In any event, amicus's "controlling principle" has not yet been settled: in *Neztsosie*, this Court expressly declined to resolve whether the cross-appeal requirement is "strictly jurisdictional" under more general appeal provisions, 526 U.S. at 480, and, because this case arises under Section 3742, that general question is not presented. See U.S. Br. 26-29.

Ruiz, 536 U.S. 622, 626-628 (2002), and the similar provisions of Section 3742(b) presumably must be as well. Congress's choice to separate by party the only two subsections of the statute that define an appellate court's jurisdiction clearly indicates that a notice (or cross-notice) of appeal by the particular party aggrieved is a prerequisite to the court's power to address that issue.

Amicus acknowledges that this Court's decision in *Ruiz* establishes that Section 3742 is "jurisdictional," but amicus suggests (Br. 13) it is jurisdictional only "in the limited sense that it delineates the types of sentencing claims that appellate courts have the authority to hear." But the text and structure of subsections (a) and (b) indicate that the jurisdictional limitations go beyond that. The text of each subsection sets forth not just the types of claims, but which party may "file a notice of appeal" as to which particular types of claims. 18 U.S.C. 3742(a) and (b). It is true, as amicus points out (Br. 13 n.6), that three of the four types of appealable claims delineated in subsection (a) are identical to those in subsection (b), see 18 U.S.C. 3742(a)(1), (2), (4) and (b)(1), (2), (4), and that the fourth type of defendant claim is the mirror image of the fourth type of government claim, see 18 U.S.C. 3742(a)(3) and (b)(3). But that overlap demonstrates that Congress could easily have written a single "notice of appeal" provision that—like the review and remedial provisions in subsections (e) and (f)—placed in one provision the delineation of claims. Instead, and in stark contrast to the review and remedial provisions (but consistently with normal rules of appellate practice), Congress separated the jurisdictional provisions into two subsections. Congress's decision to do so, and to provide separately for notices of appeal by defendants and notices of appeal by the gov-

ernment, should be given effect. See *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 515 n.11 (2006) (recognizing that federal-court jurisdiction can be limited to specific parties and particular types of claims).

Although amicus suggests otherwise (Br. 14-15), the language in 18 U.S.C. 3742(f)(2) (Supp. V 2005) is not to the contrary. In subsection (f)(2), as in the other remedial provisions, Congress included in one provision the remedies for appeals by either the defendant or the government. The fact that subsection (f)(2) provides for varying remedies depending on whether the appeal was filed under subsection (a) or under subsection (b) reflects nothing more than that the claims in subsections (a)(3) and (b)(3) are, as amicus recognizes (Br. 13 n.6), mirror images of one another. In other words, the "imposed in violation of law" and "incorrect application of the sentencing guidelines" claims are worded identically and have the same scope in subsections (a) and (b), and therefore have the same remedy in subsection (f)(1). Compare 18 U.S.C. 3742(a) and (b) with 18 U.S.C. 3742(f)(1) (Supp. V 2005). For sentences outside the Guidelines, however, the types of claims available to the parties in fact differ. For example, for sentences outside the Guidelines range, a defendant can appeal an upward departure as excessive, but the government cannot appeal that same upward departure as insufficient. Compare 18 U.S.C. 3742(a)(3) with 18 U.S.C. 3742(b)(3). The remedy provision is therefore worded differently. 18 U.S.C. 3472(f)(2) (Supp. V 2005). But to read more into subsection (f)(2), as amicus does, would make little sense. As a policy matter, it is hard to imagine why Congress would provide for "an incorrect application of the sentencing guidelines" to be corrected under subsection (f)(1) even if the party harmed by the error did not

file its own notice of appeal, but would have required each party to file a notice of appeal for departure errors under subsection (f)(2).

Amicus relies (Br. 12-13) on the fact that two earlier and more limited sentencing-appeal provisions expressly provided that a court of appeals could not increase a defendant's sentence absent the government's appeal of the sentence. See U.S. Br. 15 n.5, 20 n.9. He concludes (Br. 12-13) that Congress intentionally abrogated that prohibition by failing to include similar "limiting language" in Section 3742 and instead mandated the review and correction of illegal sentences. But those earlier statutes also expressly provided that any appeal by the government of a sentence should be "deemed the taking of a review of the sentence and an appeal of the conviction by the defendant."[3] It therefore made sense for Congress to clarify that the opposite "deeming" rule did not exist. Section 3742 contains no express "deeming" language and Congress thus had no need to clarify that a defendant's appeal did not expose the defendant to an increased sentence when the government did not appeal. Amicus would attribute to Congress the intent that any appeal by the government *or* the defendant would be deemed to be an appeal by the other as well. He provides no support, however, for such an unusual appellate regime.

Party-specific jurisdictional provisions like the separate provisions in Section 3742(a) and (b) are not un-

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[3] Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1001(a), 84 Stat. 950 (enacting 18 U.S.C. 3575 and 3576 (1970)), repealed by Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98-473, § 212(2), 98 Stat. 1987; Controlled Substances Act, Pub. L. No. 91-513, Tit. II, § 409(h), 84 Stat. 1269 (21 U.S.C. 849(h) (1970)), repealed by SRA § 219, 98 Stat. 2027.

known in criminal law. See U.S. Br. 21-22 (discussing 18 U.S.C. 3731 (2000 & Supp. V 2005), which provides for government appeals, *inter alia*, of dismissals of indictments, new trials, and suppression rulings, but provides no jurisdiction for a defendant's interlocutory appeal). Amicus dismisses the analogy to Section 3731 on the ground that Section 3742, unlike Section 3731, "allows both defendants and the government to appeal." Amicus Br. 15 n.7. But the fact that Section 3742 *permits* either party to appeal does not mean that one party's decision to appeal vests the court of appeals with jurisdiction over appeals that the other party could have brought, but did not. Indeed, subsections (a) and (b) are structured just like Section 3731 in the relevant sense, in that just as Section 3731 specifies that it allows for "Appeal by United States," subsection (a) of Section 3742 allows for "Appeal by a Defendant" and subsection (b) allows for "Appeal by the Government." Compare 18 U.S.C. 3731 (2000 & Supp. V 2005) with 18 U.S.C. 3742(a) and (b).

C. Section 3742(b)'s Approval Provision Bolsters The Conclusion That The Government Must File Its Own Appeal

As the government explained, Congress conditioned the prosecution of a sentencing appeal on the approval of the Attorney General, the Solicitor General, or a designated deputy solicitor general, and a defendant's decision to appeal does not do service for the government's determination on when to invoke appellate resources. U.S. Br. 19-20. Amicus asserts (Br. 22) that, once a defendant challenges his sentence on appeal, the absence of high-level Justice Department approval to challenge a sentencing error is "irrelevant." And he suggests (*id.* at 23-24) that concluding otherwise is tantamount to

allowing the government to stipulate to the governing law, or requiring the court of appeals to ignore the law on an issue within its cognizance. But the jurisdictional scheme in Section 3742 does not speak to the applicable law; rather, it speaks to *who* decides whether to bring an issue before the court of appeals in the first instance. Cf. *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984) ("While the Executive Branch must of course defer to the Judicial Branch for final resolution of questions of * * * law, the former nonetheless controls the progress of Government litigation through the federal courts.").

For sentencing errors that aggrieve the government, Section 3742(b) expressly answers that question. Congress required that one of only several specified high-ranking Department of Justice officials *personally* approve each and every sentencing appeal the government presses. 18 U.S.C. 3742(b). While other provisions of the United States Code place restrictions on the government's litigating prerogatives, few contain a comparably stringent combination of personal and case-by-case approval.[4] That this special provision arises in the context of government sentencing appeals is consistent with the important role that prosecutorial discretion plays in the criminal justice system. Such exercises of prosecutorial discretion mean that courts routinely consider cases in

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[4] See, *e.g.*, 18 U.S.C. 3731 (2000 & Supp. V 2005) (requiring case-by-case certification for interlocutory government appeals, but only by "the United States attorney"); 28 U.S.C. 515(a) (requiring Attorney General to "specifically direct[]" who may conduct legal proceedings on behalf of the United States, but not on a case-by-case basis); 28 U.S.C. 519 (requiring all United States litigation to be supervised by the Attorney General, but neither personally nor on a case-by-case basis); cf. 28 U.S.C. 510 (permitting Attorney General to delegate such authority "as he considers appropriate").

which the legal and factual issues are circumscribed by the government's decisions. In this context, Congress expressly mandated that the balancing of the government's competing interests and the decision to draw upon limited appellate resources be left in the hands of the Executive Branch. The happenstance of a defendant's appeal on other sentencing issues should not allow (much less require) courts of appeals to arrogate that decision to themselves.

The required authorization governs the conduct of litigation by the Executive Branch; proof of authorization is therefore not a prerequisite to the courts' exercise of jurisdiction over a government sentencing appeal.[5] Nevertheless, the requirement of Executive Branch approval that Congress imposed on government sentencing appeals demonstrates that Congress did not envision appellate review of sentencing errors that aggrieve the government absent a considered determination *by the government* that the error warranted an appeal. Amicus's position would thwart that process.

Nor is amicus correct to suggest that the concerns underlying the approval provision "have no relevance once the defendant has independently chosen to challenge his sentence's legality." Amicus Br. 25. Amicus's argument seems based on the assumption that the interests of the government (and, by extension, the public) will never be harmed by *sua sponte* appellate consideration of sentencing issues that the government could have appealed, but did not. But as the government explained (U.S. Br. 42-44), a myriad of factors informs a decision to appeal a sentencing error—including the

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[5] See, *e.g.*, *United States* v. *Ruiz-Alonso*, 397 F.3d 815, 818 (9th Cir. 2005); *United States* v. *Zamudio*, 314 F.3d 517, 520 (10th Cir. 2002); *United States* v. *Gonzalez*, 970 F.2d 1095, 1102 (2d Cir. 1992).

incremental benefit, the burden of resentencing, and the possibility that the case is an unfavorable vehicle for developing the law. Those concerns transcend an appellate panel's perception that a particular error is plain.

D. Historical Limitations Support The Conclusion That The Government Must File Its Own Notice Of Appeal

Any doubt about the scope of Section 3742 should be resolved by considering the historical limitations on government appeals in criminal cases. See U.S. Br. 13-15. This Court has repeatedly stated that "the United States has no right of appeal in a criminal case, absent explicit statutory authority." *United States* v. *Scott*, 437 U.S. 82, 84-85 (1978); see, *e.g.*, *United States* v. *Sanges*, 144 U.S. 310, 323 (1892). Even when Congress has "plainly provided" appellate jurisdiction over government claims in criminal cases, this Court has applied "a close restriction of its uses to those authorized by the statute." *Carroll* v. *United States*, 354 U.S. 394, 400 (1957).

Rather than address this principle, amicus asserts (Br. 21) that Congress's passage of Section 3742 makes "reliance on standard appellate doctrines that shy away from reviewing judgments not challenged by those they harm and on more specific rules disfavoring challenges to sentences * * * wholly misplaced." That might be a fair point if Section 3742 made explicit the particular radical change in appellate practice that amicus ascribes to it. But in the absence of such explicit direction, general statements that Congress's purpose was to expand the scope of appellate review of sentences and to achieve greater uniformity in sentencing (see Amicus Br. 16-21) fall far short of supporting the innovation in appellate practice that amicus advocates.

Although Section 3742 did expand appellate jurisdiction, Section 3742(a) and (b) are unquestionably more limited in scope than general appellate jurisdictional provisions. See, *e.g.*, 28 U.S.C. 1291; see also U.S. Br. 16. Most notably, Congress did not permit the aggrieved party to appeal every sentencing error. *Ruiz*, 536 U.S. at 627. That limitation makes it implausible to suggest that "[t]he only way" to effectuate Congress's objectives is by "obligating appellate courts" to determine whether the district court committed any sentencing errors that *could* have been appealed "regardless of whether the determination helps or hurts the appealing party." Amicus Br. 21. Interpreting Section 3742 to require appellate courts *sua sponte* to correct errors harming the government once the defendant has appealed is especially implausible because giving the government the right to appeal was itself controversial. See, *e.g.*, S. Rep. No. 225, 98th Cong., 1st Sess. 65 (1983) ("Another frequent criticism leveled at the bill is that it should not provide the government with the power to appeal a sentence."); *id.* at 151. Amicus's proposal would also contradict the Senate Report's concern that a system in which a sentence could be increased as a result of a defendant's appeal would "place[] an undesirable strain on the defendant's right to seek review." *Id.* at 151 n.370. Under the government's interpretation, a defendant faced with a government cross-appeal is on early notice of the risk of a harsher sentence and can decide whether to continue his appeal or to negotiate a dismissal of the competing appeals; under amicus's interpretation, the defendant would appeal at his own peril, with no notice of a potential sentencing increase until the court of appeals issues its opinion.

Contrary to amicus's suggestion (Br. 31-32), a jurisdictional requirement that each party file its own notice of a sentencing appeal does not create procedural complexity or needless paperwork. In the sentencing context, the government and the defendant can easily distinguish between "seeking to alter the judgment in [his] favor," which requires a notice of appeal, and "defending a judgment on new grounds," which does not. *Id.* at 32 (citation omitted). Nor does the jurisdictional bar unfairly preclude relief for a defendant who failed to appeal, but whose sentence is obviously "unlawfully long." NACDL Amicus Br. 16; Amicus Br. 33. A court of appeals need not *sua sponte* grant such relief because a criminal defendant may be able to obtain relief under 28 U.S.C. 2255, which allows, *inter alia*, a claim "that the sentence was imposed in violation of * * * laws of the United States" or "that the sentence was in excess of the maximum authorized by law." See *Carlisle* v. *United States*, 517 U.S. 416, 436 (1996) (Ginsburg, J., concurring) (noting that "[i]t bears emphasis * * * that the Government recognizes legal avenues still open to [the defendant] to challenge the sufficiency of the evidence to warrant his conviction," including "a postconviction motion, under 28 U.S.C. § 2255"); see also *Glover* v. *United States*, 531 U.S. 198 (2001) (additional jail time constitutes prejudice in a challenge under Section 2255 to the effectiveness of counsel's litigation of sentencing claims).

II. EVEN IF NOT STRICTLY JURISDICTIONAL, THE FILING OF A TIMELY NOTICE OF CROSS-APPEAL IS A MANDATORY CLAIM-PROCESSING RULE THAT MUST BE ENFORCED WHEN PROPERLY INVOKED

A. Courts Have A Duty To Enforce The Cross-Appeal Requirement When It Is Properly Invoked

1. Amicus relies (see Br. 29) on *Langnes* v. *Green*, 282 U.S. 531 (1931), to suggest that the cross-appeal requirement is merely a "rule of practice" that may be discarded whenever the court "deems there is good reason to do so." *Id.* at 538. But this Court's subsequent unanimous decision in *Neztsosie* emphatically endorsed a strict application of the cross-appeal requirement. *Neztsosie*, 526 U.S. at 480; see U.S. Br. 29-37. The statement in *Langnes* on which amicus relies is only dicta—and dicta that has been undercut by this Court's subsequent decisions. See *Morley Constr. Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 187 (1937) (holding that a court of appeals lacks the "power * * * to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal"); *Neztsosie*, 526 U.S. at 480 n.3 (suggesting that this Court's cross-petition requirement—which was the subject of the dictum in *Langnes*—is not one subject to exception) (citing *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 365 n.8 (1994)).

Amicus argues that *Morley*'s reference to a lack of "power" does not suggest that the cross-appeal requirement is "an unqualified bound on the jurisdiction of the courts of appeals." Amicus Br. 30 (quoting *Neztsosie*, 526 U.S. at 480). *Morley*, however, did not treat the cross-appeal requirement as merely a "flexible 'rule of practice'" that can be dispensed with for any "good rea-

son." See Amicus Br. 29-30 (citation omitted). This Court similarly used the terms "power" and "authority" in *Carlisle* in holding that a district court lacked authority to grant a postverdict motion for judgment of acquittal filed one day outside the time limit prescribed by the Federal Rules. See *Carlisle*, 517 U.S. at 421-422, 433. While this Court has since explained that the holding in *Carlisle* was not a "jurisdictional" one, the Court has made clear that such non-jurisdictional claim-processing rules are mandatory and inflexible when properly invoked. See *Eberhart* v. *United States*, 546 U.S. 12, 18-19 (2005) (per curiam); *Kontrick* v. *Ryan*, 540 U.S. 443, 454-456 (2004).

Similarly, the relevant timing deadlines for criminal sentencing appeals do not have jurisdictional significance (see Amicus Br. 34-36; U.S. Br. 24-26), but those rigid time restrictions nevertheless foreclosed the court of appeals' action here. See U.S. Br. 33-37. Parties may cross-appeal after the deadline for filing a notice of appeal. See, *e.g.*, Fed. R. App. P. 4(b)(1)(A)(ii) and (B)(ii). But that additional period for filing a cross-appeal has a definite limit, including a restriction on the court's authority to provide extensions. Fed. R. App. P. 4(b)(4), 26(b)(1). Under this Court's cases, these time limits must be enforced when properly invoked. They should not be circumvented by *sua sponte* action of the court. See, *e.g.*, *Carlisle*, *supra*. A rule permitting such action could only give parties who missed the cross-appeal deadline an incentive to hint at claims of error in hopes that the court of appeals would correct the error on its own.

2. Amicus asserts (Br. 30) that "[v]arious circuits have adhered to the rule-of-practice position for decades," but even if that were true, *Neztsosie* viewed the

matter otherwise. While *Neztsosie* did not resolve the circuit conflict over the "theoretical status" of the rule as "strictly jurisdictional" or not, the Court made clear that the "firmly entrenched rule" was subject to few, if any, exceptions. 526 U.S. at 480 & n.2. And, although amicus cites post-*Neztsosie* courts of appeals' decisions, see Amicus Br. 30, none of those decisions discusses how a "flexible rule of practice" approach can be squared with *Neztsosie*. The one decision that, despite citing *Neztsosie*, relaxed the rule did so because the law had changed after the time for cross-appeal had lapsed. *Lee* v. *Burlington N. Santa Fe Ry.*, 245 F.3d 1102, 1107 (9th Cir. 2001). If such an exception were justified, it would hardly mean that the cross-appeal rule disappears whenever the court sees plain error under existing law.[6]

B. There Is No Warrant For Creating An Exception To The Cross-Appeal Requirement In This Case

Even assuming that a timely cross-appeal is not strictly jurisdictional and that sufficiently extraordinary circumstances might justify an exception to that re-

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[6] *Spann* v. *Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir.) (R.B. Ginsburg, J.), cert. denied, 498 U.S. 980 (1990), upon which amicus also relies (Br. 36 n.14), predates *Neztsosie*, and in any event is very different from the situation here. In that case, the district court had failed to enter its judgment in a separate document as required by the Federal Rules, and there was thus uncertainty as to whether the appellants' appeal was premature and whether any notice of cross-appeal was even yet required. *Spann*, 899 F.2d at 31-33. In that context, the D.C. Circuit allowed both the appellants' appeal and the appellee's cross-appeal (despite the lack of a notice), *ibid.*, concluding that neither appellants nor the appellee "should be trapped by the confusion that existed over the timing of the [appellants'] appeal." *Id.* at 33.

quirement, no sound basis supports an exception in this case. See U.S. Br. 39-47.

1. *Langnes.* Again invoking the dicta from *Langnes*, amicus suggests that "[t]he relevant question is * * * whether the court of appeals had 'good reason' to deviate from the [cross-appeal] rule in this case." Amicus Br. 36 (quoting *Langnes*, 282 U.S. at 538). Perhaps recognizing that a "good reason" standard does not hold great promise as a means to provide parties notice when a cross-appeal is necessary, amicus suggests that the Court consider the factors used by the Ninth Circuit in deciding whether a particular reason is "good." See Amicus Br. 36 & n.14 (citing *Lee*, 245 F.3d at 1107 & n.3). Even if the Court were to adopt such an amorphous standard—a standard that, as explained, is at least in significant tension with *Neztsosie* and this Court's other precedent—those factors would not justify an exception here.

Only the first factor of the Ninth Circuit's test—the interrelatedness of the sentencing issues on appeal with the issue that was not cross-appealed—even arguably cuts in favor of excusing the lack of a cross-appeal here. The second and third factors—whether the district court's ruling should have put the government on notice of the need to cross-appeal and whether a notice of cross-appeal was filed late or not at all—strongly counsel against reaching the error. As for the fourth factor, there is good reason to believe that petitioner was prejudiced by the absence of a cross-appeal, as he might well have negotiated mutual dismissals of the competing appeals if the government had sought to increase his sentence. See U.S. Br. 37. Amicus seems to assume (Br. 36-37) that petitioner should have realized that his appeal alone would require (or at least empower) the court

of appeals to increase his sentence, despite the lack of a government cross-appeal. Nothing in this Court's case law, however, suggested such a consequence, and much suggested the opposite.

Amicus also asserts that enforcing a mandatory consecutive sentence under 18 U.S.C. 924(c) "surely qualifies as 'good reason' to dispense with the cross-appeal requirement." Amicus Br. 37. Section 924(c) indeed imposes a mandatory obligation on the district court. But that mandatory provision co-exists with the government's prosecutorial discretion to decide whether to press counts that carry mandatory minimums. There is no reason to think a radically different situation exists with respect to appeal decisions. Indeed, the very nature of the cross-appeal requirement (and all mandatory claim-processing rules) presupposes that some true errors, even errors about substantial issues, will go uncorrected. See, *e.g.*, *Carlisle*, 517 U.S. at 421 (noting that an untimely motion could not be granted even in the face of "a claim of legal innocence," in a case where the district court had granted a belated motion for judgment of acquittal). The adversary system presupposes that parties can (and should) take the steps that they believe best protect their interests. Courts then adjudicate those claims. The appellate process in the criminal justice system is not exempt from that basic background principle.

2. *Section 3742.* Amicus again relies on the mandatory language of the standard-of-review and remedial provisions in Section 3742, contending (Br. 39) that, even in the absence of a cross-appeal, "section 3742 required the court of appeals to determine the legality of Petitioner's sentence once he filed an appeal under section 3742(a)(1), and to remand for resentencing." But

even assuming that a notice of appeal by the government is not a *jurisdictional* prerequisite to appellate consideration of sentencing errors that aggrieve the government, see pp. 3-15, *supra*, Section 3472 should not be read to create a blanket exception to the cross-appeal requirement in all sentencing cases.

The cross-appeal requirement was well-established when Congress enacted Section 3742 in 1984. As this Court observed in *Neztsosie*, the Court had recognized the requirement as early as 1796 and had described the rule as "inveterate and certain" in 1937. See 526 U.S. at 479 (citing *McDonough* v. *Dannery*, 3 U.S. (3 Dall.) 188, 198 (1796), and *Morley*, 300 U.S. at 191). Congress enacted Section 3742 with presumed awareness of that background understanding, including that this Court had never recognized an exception to the rule. See, *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979). Nothing in Section 3742 remotely suggests that its remedial provisions overrode that well-established rule and allowed—much less required—courts of appeals to enlarge judgments in favor of an appellee who did not cross-appeal.

To the contrary, Congress entrusted to several high-ranking Justice Department officials, not the courts, the decision whether sentencing errors that aggrieve the government should be pursued on appeal. See 18 U.S.C. 3742(b). That delegation strongly supports the conclusion that courts should not address a sentencing error that aggrieves the government *sua sponte*, when no Justice Department official authorized an appeal. Some courts have even dismissed a government sentencing appeal in the absence of "evidence that the Government

ever received § 3742 approval for th[e] appeal."[7] But no court, when faced with a motion to dismiss a government cross-appeal, has suggested that the Solicitor General's approval is "irrelevant" so long as the defendant has appealed his sentence.[8]

3. a. *Section 2106.* Amicus alternatively relies (Br. 39-43) on the supervisory power of courts of appeals to correct judgments under 28 U.S.C. 2106. But Section 2106 is not limited to plain errors, much less to sentencing errors in criminal cases—it applies in all cases, civil and criminal, and to all errors. 28 U.S.C. 2106 (stating that an appellate court "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a

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[7] *United States* v. *Thibodeaux*, 211 F.3d 910, 912 (5th Cir. 2000) (acting after the defendant's brief claimed a lack of authorization); *United States* v. *Ajmal*, No. 96-1405, 1997 WL 92935, at *1 (2d Cir. Mar. 5, 1997) (dismissing cross-appeal after government conceded it was not authorized); *United States* v. *Riggins*, No. 95-2181, 1995 WL 610333, at *2 (8th Cir. Oct. 18, 1995) (same); see also *United States* v. *Smith*, 910 F.2d 326, 328 (6th Cir. 1990) (per curiam) (imposing under its supervisory powers a requirement that the government file written proof of authorization with the court).

[8] *United States* v. *Boone*, No. 91-5585, 1993 WL 192513 (4th Cir. June 8, 1993), upon which amicus relies (Br. 12), is not to the contrary. There, the court dismissed the government's cross-appeal on defendant's motion when it came to light at oral argument that the cross-appeal, which alleged failure to comply with a statutory minimum, had not been authorized under Section 3742(b). *Id.* at *3. Although the court observed that "[i]n view of these developments at oral argument [defendant] withdrew his appeal on the sentencing issue so as not to expose himself to yet a longer sentence than that which he was given," *ibid.*, the implicit suggestion that he was so exposed was at most dicta. The more relevant lesson from *Boone* is that a defendant who realizes that he risks a sentencing increase on appeal may agree to forgo his own appeal if the government will dismiss its cross-appeal. Amicus's approach deprives defendants of that opportunity.

court lawfully brought before it for review"). Amicus's construction of Section 2106 would swallow the cross-appeal rule, a conclusion that is irreconcilable with *Neztsosie*; otherwise, Section 2106 would have been a basis to affirm the court of appeals in *Neztsosie*.

This Court has not read Section 2106 as trumping all rules of practice and procedure. To the contrary, the Court has recognized that "the broad grant of authority to the Courts of Appeals in § 2106 must be exercised consistent with the requirements of the Federal Rules of Civil Procedure as interpreted by this Court." *Unitherm Food Sys., Inc.* v. *Swift-Eckrich, Inc.*, 546 U.S. 394, 402 n.4 (2006). Nothing justifies a different conclusion with respect to the centuries-old cross-appeal requirement or the Federal Rules of Appellate Procedure governing the time deadlines for such cross-appeals.[9] Indeed, in the absence of a cross-appeal, an issue is arguably not "lawfully brought" before the court of appeals within the meaning of Section 2106. See *United States* v. *Barragan-Mendoza*, 174 F.3d 1024, 1030 (9th Cir. 1999) (on defendant's appeal from ruling on government's Rule 35 motion, refusing government's suggestion of a remand under 28 U.S.C. 2106 for correction of original "illegal" sentence because the government had neither appealed the original sentence on direct appeal

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[9] The cases on which amicus relies (Br. 40-41) involve defendants who themselves sought review; the appellate courts' recognition of errors harming those defendants does not support an exception to the cross-appeal rule. *Yates* v. *United States*, 356 U.S. 363, 366 (1958) (per curiam); *Tinder* v. *United States*, 345 U.S. 565, 566 (1953); *United States* v. *Wiley*, 278 F.2d 500, 503 (7th Cir. 1960) (defendant appealed on sentencing issue); *United States* v. *Ahuja*, 936 F.2d 85, 85 (2d Cir. 1991) (same); *Millich* v. *United States*, 282 F. 604 (9th Cir. 1922) (defendants appealed on other grounds).

nor filed a cross-appeal on the Rule 35 appeal); *United States* v. *Whaley*, 148 F.3d 205, 207 (2d Cir. 1998) (per curiam) (same).

b. *Sentencing Package Cases.* Most courts of appeals have recognized that, if a defendant successfully attacks some, but not all, of the counts of conviction on a multi-count indictment, the court of appeals may vacate the entire sentence on all counts so that the district court can consider the overall consequences for its sentencing plan. U.S. Br. 23 n.11. But those cases do not support amicus's position here. See Amicus Br. 40-41.

In the sentencing package cases, the defendant, by asking to have some or all of his convictions or sentence set aside, has implicated the entire sentencing package, which opens up that entire package for reconsideration on remand, if the defendant succeeds on appeal. See, *e.g.*, *United States* v. *Busic*, 639 F.2d 940, 947 n.10 (3d Cir.) ("When a defendant challenges one of several interdependent sentences, he, in effect, challenges the entire sentencing plan."), cert. denied, 452 U.S. 918 (1981); *United States* v. *Pimienta-Redondo*, 874 F.2d 9, 16 (1st Cir.) (en banc), cert. denied, 493 U.S. 890 (1989); *United States* v. *Shue*, 825 F.2d 1111, 1115 (7th Cir.), cert. denied, 484 U.S. 956 (1987). Any other approach would provide defendants an unintended windfall merely because of the way the district court structured the initial sentence. See *Busic*, 639 F.2d at 950 (citation omitted) ("'To hold otherwise would allow the guilty to escape punishment through a legal accident.'"). Here, in contrast, petitioner was unsuccessful on his appellate issues. Affirming the judgment without reaching out to address issues that would permit a sentencing increase would not give petitioner an unjustified windfall.

4. *Rule 52(b)*. As the government explained in its opening brief (U.S. Br. 39-47), reading Rule 52(b) to authorize relief in the absence of a cross-appeal would create a blanket plain-error exception to the cross-appeal requirement in all criminal cases. Although it is true (Amicus Br. 42, 51) that this Court has corrected plain errors that were not raised by defendants, it has done so only in cases in which the defendant had himself petitioned the Court for review on other grounds. See *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam); *Reynolds* v. *United States*, 98 U.S. 145, 168-169 (1878) (note on rehearing). Where the aggrieved party has filed a notice of appeal (or a petition for a writ of certiorari), his adversary has been placed on notice that he seeks to have the judgment altered in his favor. Amicus cites no case from this Court that has expanded the judgment in favor of a party that neither petitioned nor cross-petitioned, and the government is aware of none. See *Neztsosie*, 526 U.S. at 480. At most, this Court has suggested "in passing" that it *might* be appropriate to excuse the cross-appeal requirement with respect to a constitutional issue in a criminal case. *Id.* at 480 n.3. That is a far cry from excusing the cross-appeal requirement whenever there is plain error, and it is not comparable to reaching out to do so here in the absence of a cross-appeal by the government.

It is correct to observe that the cross-appeal requirement will inevitably mean that certain errors not recognized until after briefing, or on the eve of oral argument, will go unremedied. Amicus Br. 51-52. That, however, is the result of any mandatory claim-processing rule and the principle of finality; there inevitably comes a point in the process where errors can no longer be raised.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed in part, and the case remanded for re-imposition of the original sentence.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

APRIL 2008

REPLY BRIEF

(10)

No. 07-330

4-8-08

IN THE
Supreme Court of the United States

MICHAEL J. GREENLAW,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

This case presents the question whether the court of appeals was authorized *sua sponte* to increase petitioner's sentence by fifteen years notwithstanding the Government's decision not to file any appeal. As the opening briefs of petitioner and the United States demonstrated, the answer to that question is "no." *Amicus* nonetheless contends that once petitioner appealed his sentence, 18 U.S.C. § 3742 not only authorized but in fact obligated the court of appeals to go beyond the issues raised by the parties and to examine the record to review whether the sentence was unlawful in any respect. That novel interpretation – which, to the best of petitioner's knowledge, has never been advanced by any court or commentator, much less by the Eighth Circuit in this case – would transform courts of appeals in sentencing cases from neutral arbiters in an adversarial system into administrative overseers with free-ranging power to revise sentences. Such a result would be contrary to the text, structure, and history of the governing statute, would turn traditional principles of appellate jurisdiction on their head, and would threaten a profound waste of judicial resources.

This case is instead governed by the settled principle that a judgment can be enlarged only in favor of a party that files a notice of appeal. It makes no difference on the facts of this case whether that principle is labeled "jurisdictional" or a "rule of practice." Even if the principle is simply a rule of practice, it is controlling so long as it is properly

invoked, as it was here through petitioner's request for rehearing.

I. 18 U.S.C. § 3742 Reflects Traditional Principles Of Appellate Jurisdiction.

Amicus's entire argument depends on his construction of 18 U.S.C. § 3742(e) as conferring plenary power to review a defendant's sentence. That position ignores the historical backdrop against which Section 3742 was enacted, as well as the structure of the section itself.

1. In 1796, this Court held that it lacked the power to modify a judgment in favor of a non-appealing party, *McDonough v. Dannery*, 3 U.S. (3 Dall.) 188, 198 (1796), a principle that equally precludes modifying the judgment so as to "lessen[] the rights of" the appealing party, *see, e.g., United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924). In the more than two centuries since that decision, this Court has never questioned the validity of, nor recognized an exception to, the cross-appeal requirement, which is grounded in the equally well-established rule that those portions of the judgment decided in an appellant's favor are not before the court unless the appellee files a cross-appeal. *See, e.g., Buckingham v. McLean*, 54 U.S. (13 How.) 150, 151 (1852) ("By this appeal all the questions are brought before us, which were decided to the prejudice of the appellants."); *Mail Co. v. Flanders*, 79 U.S. (12 Wall.) 130, 135 (1870) ("inasmuch as that part of the decree was in favor of the appellants, and the respondent did not appeal, the error, if it be one,

cannot be corrected"); *Loudon v. Taxing Dist.*, 104 U.S. 771, 774 (1882) ("An appeal brings up for review only that which was decided adversely to the appellant."). Such a rule, this Court has explained, "is meant to protect institutional interests in the orderly functioning of the judicial system, by putting opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 481-82 (1999) (per curiam).

Acting against the backdrop of this "inveterate and certain" rule, *see Morley Constr. Co. v. Md. Cas. Co.*, 300 U.S. 185, 191 (1937), as well as this Court's precedents narrowly construing the availability of government appeals in criminal cases, *see Carroll v. United States*, 354 U.S. 394, 400 (1957), in 1984 Congress enacted the Sentencing Reform Act (SRA). Among other things, that Act provides both the government and criminal defendants with "a limited practice of appellate review of sentences." S. Rep. No. 98-225, at 149 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3332.

The operation of 18 U.S.C. § 3742 is straightforward, reflecting traditional principles of appellate jurisdiction. First, as this Court has recognized, *see United States v. Ruiz*, 536 U.S. 622, 627-28 (2002), the appellate court's jurisdiction over a sentencing appeal arises from subsections (a) through (c). Those sections limit who can appeal a sentence, and under what conditions. The two parties entitled to appeal are the defendant and the Government. Either one can initiate an appeal by filing a notice of

appeal. Subsections (a) through (c) also identify the types of sentencing claims that can be brought on appeal. Three of these claims – sentences imposed in violation of law, sentences resulting from a misapplication of the guidelines, and plainly unreasonable sentences not governed by the guidelines – are identical for both the defendant and the Government. The other kinds of sentencing claims that the defendant and Government may bring on appeal are mirror images of one another: the defendant may appeal upward departures from the guidelines and sentences that exceed the sentence set forth in a plea agreement, while the Government may appeal downward departures and sentences that are lower than the one provided in a plea agreement. Significantly, Congress declined to permit the parties to challenge other aspects of a sentence, such as the district court's failure to grant a departure, *see Ruiz*, 536 U.S. at 627, and its decision to impose a sentence consistent with a plea agreement, *see* 18 U.S.C. § 3742(c). Of particular salience to this case, Section 3742 expressly conditions appeals by the Government: once the Government has filed an initial notice of appeal, it may further prosecute the appeal only with the "personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." *Id.* § 3742(b).

While subsections (a) through (c) of Section 3742 identify who can bring an appeal and under what circumstances, subsection (e) sets out the responsibilities of the court of appeals with respect to those appeals. *See United States v. Booker*, 543 U.S.

220, 259 (2005) (describing Section 3742(e) as "set[ting] forth standards of review on appeal"). The language of subsection (e) parallels the language of subsections (a) through (c), thereby presupposing that the court of appeals is addressing the claims raised by the parties.

The final subsection of Section 3742, subsection (f), outlines the remedies available when the court of appeals concludes that an error has been established. This subsection also parallels the classes of errors that the court can review. Thus, it provides first that "[i]f the court of appeals determines that . . . the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. § 3742(f)(1). Because both the defendant and the Government can appeal an unlawful sentence or an incorrect application of the sentencing guidelines, subsection (f)(1) does not distinguish between appeals by the defendant and the Government.

When a defendant or the Government has challenged a departure from the applicable guideline range, subsection (f)(2) repeats the distinction – made in subsections (a)(3) and (b)(3) – between the different kinds of departures that defendants and the Government are entitled to appeal. Thus, it begins by providing that if the sentence is outside the applicable guideline range and the court finds the sentence in error for one of several enumerated

reasons, the court of appeals "shall state specific reasons for its conclusion." 18 U.S.C. § 3742(f)(2). Then, "if it determines that the sentence is too high" and the appeal has been filed by the defendant, "it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate." *Id.* § 3742(f)(2)(A). If, by contrast, the court determines "that the sentence is too low" and the appeal has been filed by the Government, then it is also required to "set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate." *Id.* § 3742(f)(2)(B).

It is thus clear that the sentencing appeal process outlined in Section 3742 mirrors the ordinary appellate process by allowing a party aggrieved by a judgment to seek relief by filing a notice of appeal. The statute then contemplates that the court of appeals will consider the errors alleged by the appealing party and provides a remedy for those that the court finds meritorious. The only difference between Section 3742 and the general appellate process is that Congress in Section 3742 limited the grounds for appeal to a discrete subset of alleged errors – limitations that are reflected at each stage of the process, from the provisions that authorize a notice of appeal to the list of issues the court may consider and the relief authorized. The repeated iterations of the various grounds simply reflect Congress's decision to limit the scope of sentencing appeals to a narrow set of issues selected by the appellant from a list authorized by Congress, not to

eliminate the basic boundaries of the appellate process that had been in place for nearly two centuries by the time Congress enacted the statute.

2. *Amicus* proffers a very different construction of the statute that ignores its structure. His argument rests on the premise that the text of subsection (e), by providing that "the court of appeals shall determine whether the sentence" meets the four criteria outlined, obligates the court of appeals to make each of these determinations, regardless of which party appealed or on what ground. He goes on to conclude that once an error is identified, the court of appeals is required to remedy it, pointing to the language in subsection (f) which provides that "[i]f the court of appeals determines that" one of the specific errors has occurred, "the court *shall* remand the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. § 3742(f) (emphasis added).

The Court need not linger long over subsection (f). By its plain terms, it requires a remedy only if the court of appeals "determines that" there has been an error. It has nothing to say on the critical question of which aspects of a sentence the court may consider and which potential errors it may determine. That question is the subject of subsection (e), but that provision provides no better support for *amicus*'s theory.

As an initial matter, *amicus*'s argument fails because this Court in *Booker* required subsection (e) to be "severed and excised" from the remainder of the

statute as unconstitutional, 543 U.S. at 245, such that – even if *amicus*'s construction were otherwise correct – courts of appeals are no longer required to make the determinations outlined in subsection (e).

But even to the extent that subsection (e) is relevant as illustrative of Congress's intent in enacting Section 3742, this view of subsection (e) misapprehends the provision's function in the statute. Subsection (e) does not serve as a freestanding provision setting out the court of appeals' jurisdiction. Instead, as this Court has recognized, *see Booker*, 543 U.S. at 259-61, it merely specifies the scope of review for claims that are already properly before it – *viz.*, an error that either a defendant or the Government has challenged by filing a notice of appeal pursuant to subsections (a) through (c).

To be sure, subsection (e) does not itself expressly limit an appellate court's review of a sentencing appeal to those issues with regard to which a party has filed a notice of appeal. But by the same token, it does not expressly require that the court have jurisdiction over an appeal before determining the lawfulness of the sentence. That limitation quite literally goes without saying. So does the equally settled (and, as we argue *infra* pp. 18-20, equally jurisdictional) limitation that an appeal by one party brings to the court for review only those aspects of the judgment detrimental to the appellant. While all seem to agree that this limitation has applied for decades in every other context, *amicus* is unable to cite even a single statute

in which the traditional limitation has been expressly codified.

Notably, *amicus* does not dispute the long-standing general rule that an appellate court may not enlarge a judgment in a party's favor unless that party has filed a notice of appeal. Nor does he challenge the applicability of this rule to criminal cases, which if anything are – both by their nature and by constitutional design – more adversarial. The only question, then, is whether Congress in enacting the SRA intended not only to depart from the settled traditions of our judicial system, but also to replace the pre-1984 system, under which the right to appeal sentences was extremely limited, with an expansive and free-ranging sentencing appeals system. But this simply cannot be the case. Rather, as noted above, *see supra* at 3, Congress merely intended to create an appellate process that mirrored customary appellate process, but which if anything provided for more limited appellate review than normal appellate procedure. Moreover, nothing in the text or history of the statute reflects any intent by Congress to deviate from the general cross-appeal rule. Nor does *amicus* suggest that there is anything peculiar to sentencing cases that would undermine the general applicability of the cross-appeal rule.[1] To the contrary, Congress's

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[1] Indeed, although *amicus* asserts that "the linear progression of section 3742's text makes clear that an illegally low sentence must be remanded regardless of whether the appeal is taken by the defendant or the government," *Amicus* Br. 10, its clarity has apparently escaped the notice of every court in the nation and every treatise and law review article ever written on the federal sentencing regime.

rejection of a scheme that would have expressly permitted appellate courts to increase a sentence based solely on the defendant's appeal, *see* S. Rep. No. 98-225, at 151 n.370 (1983),[3] along with its intent to provide only "a *limited* practice of appellate review of sentences," *id.* at 149 (emphasis added), and this Court's cases narrowly construing the availability of government appeals in criminal cases, *see Carroll*, 354 U.S. at 400, all suggest that the cross-appeal rule applies fully to sentencing appeals.

Amicus's reliance on language governing appeals of sentences imposed under "special dangerous offender" statutes is misplaced. Those statutes indicated that "a sentence may be made more severe only on review of the sentence taken by the United States and after hearing." Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, § 3576, 84 Stat. 922, 950-51, *repealed by* SRA § 212(2), 98 Stat. 1987 (1985). The statute thus followed the well-settled principle that a judgment could not be enlarged in the Government's favor unless the Government appealed. Congress had good reason to make clear in these statutes that it did not intend to depart from the settled rule in this respect because the statute *did* depart from ordinary practice in another closely related area. That is, the OCCA

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[3] *Amicus* argues that, although Congress rejected the scheme in part because it would "place[] an undesirable strain on the defendant's right to seek sentence review," S. Rep. No. 98-225, at 151 n.370 (1983), no such strain would in fact result. *See Amicus* Br. 25 n.11. However, the fact that *amicus* disagrees with Congress's rationale for rejecting the scheme does not make the rejection of the scheme any less compelling.

expressly provided that when the United States filed an appeal of a sentence under the "dangerous special offender" provision, the appeal was deemed also to be one by the defendant of his conviction and sentence, even if the defendant did not actually file a notice of appeal. *See* OCCA § 3576. The language on which *amicus* relies thus served to make clear that although the statute departed from ordinary appellate practice in one respect (*i.e.*, allowing relief to a defendant who had not actually appealed), Congress did not intend to permit an equal and opposite departure for the Government (*i.e.*, allowing relief to the Government when it had not filed its own notice of appeal). When Congress subsequently enacted the SRA, it abandoned the practice of treating an appeal by the Government as an appeal by the defendant as well. Hence, there was no need to specifically state that ordinary appellate principles would govern increases to a criminal defendant's sentence.

Moreover, *amicus*'s construction is implausible because it would impose substantial burdens on the courts of appeals and subvert express congressional intent that appellate review of criminal sentences be limited. Taken to its logical conclusion, *amicus*'s expansive reading would mean that whenever one party filed a notice of appeal, the reviewing court would be required to make *all* of the findings described in subsection (e). That is, if *amicus* is right that subsection (e) *authorizes* a court of appeals to consider every potential error that might affect the lawfulness of a sentence, even in the absence of a cross-appeal, the plain text of the statute must then

also *require* the court to undertake this roving independent inquiry: the provision states, in no uncertain terms, that "[u]pon review of the record, the court of appeals *shall* determine whether the sentence . . . was imposed in violation of law." 18 U.S.C. § 3742(e)(1) (emphasis added). *Amicus*'s view thus would require a substantial increase in the resources committed by both parties (who would feel compelled to brief every conceivable issue that might arise) as well as the courts of appeals, which would not only have to review longer briefs but would also have to scour the entire record to identify any potential problem with the sentence, regardless of whether a party has raised it.

Amicus's reading of subsection (e) would also be inconsistent with Congress's decision, implemented in subsection (b), to allow senior Department of Justice officials to determine whether to pursue an appeal on the Government's behalf. As the Government explained in its opening brief, the approval requirement was intended "to ensure that the government has made a considered decision to draw upon appellate resources before an appellate court considers sentencing rulings that harm the government's interests." Gov't Br. 19. But the approval requirement (along with the purposes it was intended to serve) would be thwarted if courts of appeals were required to consider sentencing errors harming the government, even if – as in this case – the government had affirmatively decided not to appeal the errors. It would require the Government to expend resources far beyond those necessary to respond directly to the defendant's claims on appeal,

to make sure that a court of appeals does not erroneously enlarge a defendant's sentence in a way deleterious to the Government's broader interests.

In an effort to mitigate the problems that his expansive interpretation of subsection (e) would create, *amicus* suggests that courts would have no "obligation to independently research sentencing issues that are not raised by the parties." *Amicus* Br. 11 n.3. Instead, he contends only that courts would have "to remand an illegally low sentence in the absence of a government cross-appeal at least where that sentence is plainly illegally low."[3] *Id.* Similarly, he does not specifically contend that once either party has filed a notice of appeal, courts must determine whether any of the errors specified in subsection (e) are present in the defendant's sentence. Instead, he contends (at 9) only that "[o]nce either party challenges a sentence's legality, that issue is squarely before the court of appeals." However, if *amicus*'s construction of subsection (e) as an empowering provision is correct, there is no basis for reading such limitations into the statute. Once *amicus* concedes that the word "shall," as used in Section 3742, does

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[3] This proposed construction of Section 3742 would introduce a significant amount of arbitrariness into the federal sentencing system, as the question whether a defendant's sentence is increased in the absence of a government appeal would depend on various factors such as whether local Assistant U.S. Attorneys adverted to the errors in their briefs or whether federal appellate judges or their clerks had particular expertise in sentencing law, such that an error was "plain" to them even if it would not be to others. Such arbitrariness would fly in the face of the goals of uniformity and predictability that, according to *amicus*, Congress was trying to achieve.

not mean "in every circumstance," his construction collapses on itself.

3. *Amicus*'s effort (at 14-15) to draw a negative inference between Sections 3742(f)(2) and (f)(1) fares no better. *Amicus* notes that only the latter provision expressly refers to whether an "appeal has been filed," supposedly suggesting that the court of appeals can correct an error under subsection (f)(1) to favor the Government without regard to whether it has appealed.

That argument is misguided for four reasons. First, it misreads the significance of the language of Section 3742(f)(2), which includes two subsidiary provisions that correspond to the appealing party. When the court of appeals "determines that the sentence is too high," it may correct the error if "the appeal has been filed under subsection (a)" – *i.e.*, if the defendant has appealed. *Id.* § 3742(f)(2)(A). If "the sentence is too low," it may correct the error if "the appeal has been filed under subsection (b)" – *i.e.*, if the government has appealed. The statute's references to whether an appeal had been filed under subsections (a) or (b) thus merely identify the kind of appeal – *i.e.*, individual or government – at issue in the particular subsection.

Section 3742(f)(1), by contrast, has a unitary structure. It is not divided into subsections that correspond to whether the sentence is too high or too low. Instead, the court may correct a sentence "imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines."

Unlike the subdivisions of Section 3742(f)(2), it therefore was not necessary for Congress to include a clause in Section 3742(f)(1) that looked to whether "the appeal has been filed under" a particular subsection of the statute.

Second, it is entirely implausible to suggest that Congress would express its intent to depart from such a foundational and well-settled rule of appellate practice in anything less than completely clear and unambiguous language. Indeed, when Congress did depart from normal appellate practice in the OCCA, it did so expressly. *See supra* at 10-11. And certainly, the indirect evidence of such intent on which *amicus* relies (a negative inference, and an obscure one at that) is more than outweighed by the much stronger evidence, described above, that Congress intended the normal rules of appellate practice to apply to sentencing appeals under Section 3742.[4]

Third, such a construction would cause the statute to operate illogically. For example, in a case in which only the defendant had appealed, a court of appeals could increase a sentence if it was too low because the trial court misapplied the guidelines to the defendant's circumstances ((f)(1)), but not if the sentence was too low because the district court gave the defendant an unreasonable downward departure

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[4] Indeed, Congress made clear that it intended sentencing appeals under the SRA to be governed by traditional rules of appellate practice. *See* S. Rep. No. 98-225, at 155 (noting that "the Committee intends that the Federal Rules of Appellate Procedure be applicable to a proceeding under [Section 3742]").

((f)(2)). *Amicus* offers no explanation for why Congress would have wanted the statute to create such an incongruity. Moreover, such a result would be directly at odds with *amicus*'s repeated contention that Congress eliminated the cross-appeal requirement in cases such as petitioner's to ensure that inadequate and inconsistent sentences would be uniformly corrected.

The anomalies do not end there. Under *amicus*'s view, the identity of the appealing party only matters under subsections (f)(2)(A) and (f)(2)(B), which address the relief for certain out-of-guideline sentences, allowing the court to "set aside the sentence and remand the case" if a sentence is too high and the defendant appealed, or if the sentence is too low and the Government appealed. *See* 18 U.S.C. § 3742(f)(2)(A), (B). But prior to making this distinction between defendant and government appeals, subsection (f)(2) requires – importantly, without any qualification of which party appealed – that the court determine whether "the sentence is outside the applicable guideline range" and "state specific reasons for its conclusion." Under *amicus*'s view, then, the statute issues an exceedingly strange command when a district court has erroneously departed from the guideline range, but the disadvantaged party has not appealed: under subsection (e)(3), the court is required to determine whether the departure is erroneous; under subsection (f)(2), it is required to declare that determination and then "state specific reasons for its conclusion," but under subsections (f)(2)(A) and (B), having made such a declaration, it is ultimately precluded from setting

aside the sentence and remanding the case because the disadvantaged party has not appealed.[5]

This absurd result arises from *amicus*'s misconstruction of both subsections (e) and (f). Congress has not required the court of appeals to determine whether an out-of-guidelines sentence is unduly high unless the defendant has made that claim of error through his own properly noticed appeal. Nor has Congress required the courts of appeals to make vain pronouncements of error in cases in which Congress has withheld the power to provide a remedy. The far more reasonable interpretation of Section 3742 is one consistent with traditional principles of appellate jurisdiction – *viz.*, that subsection (e) permits the court of appeals to consider a departure to the extent that the affected party has appealed the departure and the departure is thus properly before it. And subsection (f) allows the court to provide a remedy to the appealing party if it agrees with the party's contention of error.

Fourth, as with his construction of subsection (e), the negative inference that *amicus* would have this Court draw would vitiate Congress's decision to entrust senior Department of Justice officials with

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[5] *Amicus* could avoid this problem by agreeing with petitioner that subsection (f) only addresses the court's response to errors it has been authorized to review under subsection (e), and then to read subsection (e)(3) as implicitly limited to review of sentencing departures detrimental to the appealing party. But if *amicus* is willing to go that far, there is no reason to resist extending that reading to subsection (e) in its entirety and understanding it to assume that the issue to be considered has been appealed by the disadvantaged party.

the power to determine whether to appeal sentences unduly favorable to a defendant. *See* 18 U.S.C. § 3742(b). That policy decision prevents line government attorneys from advancing interpretations of the sentencing laws that are contrary to DOJ policy without formally "appealing." It also empowers the Government to negotiate with defendants over the limited scope of appellate issues. Both of these important policies would be undercut substantially if the courts of appeals could effectively enlarge a sentence without the Government appealing.

II. The Cross-Appeal Requirement Is Jurisdictional, But In Any Event Must Be Enforced When Timely Invoked.

1. *Amicus*'s argument that the cross-appeal requirement is not jurisdictional boils down to two main points: first, that the timely filing of an initial notice of appeal by either party will "vest the court of appeals with plenary jurisdiction over a case," *Amicus* Br. 27; and, second, that there is no basis for distinguishing between the failure to file a *timely* cross-appeal – which does not deprive a court of jurisdiction – and the failure to file *any* cross-appeal at all. But both of these arguments largely ignore this Court's longstanding precedent.

First, although *amicus* is obviously correct that the filing of an initial notice of appeal gives the appellate court jurisdiction over the issues decided adverse to the appellant, nothing in this Court's jurisprudence suggests that the initial filing should

be treated as conferring plenary review of every single aspect of a judgment. To the contrary, this Court has repeatedly indicated that it lacks the power – that is, the jurisdiction – to review issues decided in favor of the appellants when the appellees have not filed their own appeal. *See Flanders*, 79 U.S. at 135 ("[I]nasmuch as *that part* of the decree was in favor of the appellants, and the respondents did not appeal, the error . . . *cannot* be corrected.") (emphasis added); *Morley*, 300 U.S. at 187.[6] Indeed, if *amicus*'s construction were correct, then there would be no need for cross-appeals at all, because once any party has taken an appeal, every party should be free to argue – and the court of appeals should be free to decide – any issue determined by the district court.

Second, *amicus*'s efforts to conflate timeliness and waiver overlook that cross-appeals are simply appeals that are subject to special timing provisions

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[6] *Amicus* cites this Court's decision in *Langnes v. Green*, 282 U.S. 531, 538 (1931), to support its argument that the cross-appeal requirement is not jurisdictional. But this Court's discussion of whether the cross-appeal requirement was jurisdictional or a rule of practice was merely dicta, as the respondent in that case did not seek to modify the judgment below but instead simply raised additional grounds on which the Court could affirm the decision below. *Id.* at 538. And although amicus attempts to downplay the significance of this Court's reference in *Morley* to the "power of an appellate court" by explaining that "[t]he *Morley* Court never again referred to the 'power of an appellate court,'" *Amicus* Br. 30, Justice Cardozo's opinion makes clear that "[t]he power of an appellate court to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal" was in fact the very question before the Court in that case. *Morley*, 300 U.S. at 187.

under the Federal Rules. That is, the general statutes governing the filing of appeals in civil and criminal cases make no distinction between "appeals" and "cross-appeals." What are referred to in the Federal Rules and common parlance as "cross-appeals" are simply appeals filed after another party has already filed a prior notice of appeal. Thus, the requirement that a cross-appellant file his own notice of appeal in a criminal case is not, as *amicus* implies (at 35), an extra-statutory judicial invention. It is the command of Section 3742(b). And when a party fails to file a cross-appeal, it is as if he had failed to file a notice of appeal at all. Thus, even if the *time* limits for filing a notice of appeal are not jurisdictional in a criminal case, there can be no question that the requirement that an appealing party file *a* notice of appeal is statutorily derived and jurisdictionally required.

Next, *amicus* posits in the alternative that the cross-appeal requirement cannot be jurisdictional because Section 3742 requires a court of appeals to correct an unlawful sentence regardless of which party has appealed. *See Amicus* Br. 35. But that argument is entirely circular, as it assumes the validity of *amicus*'s flawed construction of Section 3742.

3. In any event, this Court need not decide whether the cross-appeal requirement is jurisdictional. In "more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of [this Court's] holdings has ever recognized an exception to the rule." *Neztsosie*, 526

U.S. at 480. *Amicus*'s assertion that this Court should recognize an exception to the rule in this case is entirely unwarranted here.

First, as petitioner explained in his opening brief, *see* Pet. Br. 26, an exception to the general cross-appeal rule would be particularly inappropriate for cases involving sentencing errors in light of the inflexible nature of the provisions governing appeals and cross-appeals of sentences: Section 3742(b) specifically requires the Government to file a notice of appeal if it wishes to appeal a sentence, while the Federal Rules of Appellate Procedure require a party to file a notice of appeal and preclude any exceptions to the time requirements for taking appeals. *See* Fed. R. App. P. 3(a)(1), 26(b). Moreover, the fact that this case involves an erroneously low criminal sentence weighs against, rather than in favor of, finding an exception, as Congress for many decades did not provide any way for the Government to appeal such sentences. When it did finally provide for appellate review, it both limited the kinds of errors that the Government could appeal and required approval from senior Department of Justice officials.

Second, although *amicus* argues that there was "good reason to deviate from" the cross-appeal rule in petitioner's case, *see Amicus* Br. 36 (citing *Langnes*, which as noted above did not involve a cross-appeal at all), that argument rests largely on the very premises that he seeks unsuccessfully to establish in Part I of his brief – *i.e.*, that "[p]etitioner put the lawfulness of his sentence in play when he challenged it as 'unreasonable,'" *id.*; that petitioner

was somehow "on notice that the mandatory consecutive sentence lingered as an issue," *id.*; and that any claim of prejudice by petitioner is "seriously undermine[d]" by his failure to file a reply brief, *id.* at 37.

Third, even if this Court were to conclude that an exception to the cross-appeal rule might be warranted, there is no basis for *amicus*'s "good reason" standard. Indeed, elsewhere he notes that the courts of appeals which regard the cross-appeal bar as a rule of practice rather than as jurisdictional require "exceptional circumstances" before finding an exception warranted. *See Amicus* Br. 36 n.14 (citing *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 33 (D.C. Cir. 1990) (Ginsburg, R.B., J.)).[7] And the factors that *amicus* cites as illustrative of those that the courts of appeals consider in determining whether to find an exception to the cross-appeal rule, *see id.*, weigh in petitioner's favor in this case: the United States declined to file a notice of appeal at all; the Government's appellate brief demonstrated that it was well aware of the need to file a cross-appeal if it wished to challenge the district court's failure to sentence petitioner to the twenty-five-year minimum required by 18 U.S.C. § 924(c); and the Eighth Circuit's *sua sponte* increase in petitioner's sentence deprived him not only of the opportunity to brief the merits of the Section 924(c) issue and the court's authority to increase his sentence absent a cross-

[7] As the petition for certiorari notes, the majority of circuits regard the rule as jurisdictional and thus not subject to exception. Pet. Br. 6-12.

appeal, but also of the opportunity to dismiss his appeal to avoid having his sentence increased.

Finally, even if the cross-appeal requirement were open more broadly to exceptions as a type of claims-processing rule "adopted . . . for the orderly transaction of . . . business," *Schacht v. United States*, 398 U.S. 58, 64 (1970), this Court's decisions in *Kontrick v. Ryan*, 540 U.S. 443, 456-60 (2004), and *Eberhart v. United States*, 546 U.S. 12, 15-19 (2005), make clear that the judgment below must be reversed because petitioner timely invoked the rule in both his petition for rehearing and his petition for certiorari to this Court.[8] *Amicus*'s efforts to portray petitioner's invocation of the rule as "casual references" are unpersuasive[9]: petitioner "state[d] with particularity

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[8] As petitioner explained in his opening brief, the requirement that the party wishing to rely on a claims-processing rule must timely invoke the rule makes little sense in cases, such as this one, in which the court of appeals acts *sua sponte*. *See* Pet. Br. 31 n.18. At a minimum, however, petitioner timely invoked the protection of the rule by filing his petition for certiorari with this Court.

[9] Neither *Kontrick* nor *Eberhart* suggested that the party invoking a claims-processing rule needed to provide a detailed argument regarding the rule's applicability. Rather, both framed the invocation of the rule in terms of the need for the party seeking to rely on the rule to raise the rule in a timely fashion. *See, e.g.*, *Kontrick*, 540 U.S. at 447 ("[W]e hold that a debtor forfeits the right to rely on Rule 4004 if the debtor does not raise the Rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge."); *Eberhart*, 546 U.S. at 19 ("Here, where the Government failed to raise a defense of untimeliness until after the District Court had reached the merits, it forfeited that defense."). Moreover, the cases that *amicus* cites deal with whether an issue has been

each point of law or fact that [he believed] the court has overlooked or misapprehended," Fed. R. App. P. 40(a)(2), and clearly brought the cross-appeal requirement to the Eighth Circuit's attention. To be sure, the primary focus of the petition for rehearing was the Eighth Circuit's reliance on the plain error doctrine, but the body of the petition contained repeated references not only to the fact that the court of appeals increased petitioner's sentence in the absence of a Government appeal,[10] but also that it lacked the authority to do so.[11]

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preserved *on appeal* to a higher court, which petitioner has clearly done in his appeal to this Court.

[10] *See, e.g.*, J.A. 90 ("The United States government did not appeal the sentencing."); *id.* ("The panel also decided, sua sponte, to vacate Appellant's sentence and to remand the case for the purpose of resentencing Appellant to an additional term of 180 months (15 years)."); *id.* ("[T]he panel decision has subjected Appellant to a 15 year increase in sentence where the government did not appeal the district court's 442 month sentence."); *id.* at 92 ("Despite the fact that the government did not appeal the sentencing of 442 months, the panel addressed the issue . . . ."); *id.* at 93 ("The panel decided the relevant sentencing issue in this case on its own motion. The government did not appeal the district court sentence.").

[11] *See, e.g.*, J.A. 95-96 ("Here, the panel in the instant case could have, and should have, elected to take the same route as *Rivera*. Because the government did not raise an appeal or cross-appeal, Appellant's sentence should have been left alone."); *id.* at 96 ("The error was not raised by the government on appeal. The issue was therefore forfeited.").

III. Neither Section 2106 Nor Rule 52(b) Authorized The Eighth Circuit To Increase Petitioner's Sentence In The Absence Of An Appeal By The Government.

1. In 1948, Congress enacted 28 U.S.C. § 2106 to consolidate various sections in the U.S. Code relating to the power of this Court.[13] As commentators have explained, the "supervisory power" authorized by Section 2106 was clearly intended to mirror the "inherent power" of appellate courts, *see* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3938 (2d ed. 1996), and is also subject to traditional rules limiting appellate power, including the prohibition on modifying a judgment in favor of a non-appealing party. *See Carlisle v. United States*, 517 U.S. 416, 426 (1996) ("Whatever the scope of [a court's] 'inherent power,' . . . it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure."); *see also* FEDERAL PROCEDURE, LAWYER'S EDITION § 3:866 (2007) (noting that Section 2106 would neither authorize an appellate court to "overturn a jury verdict in violation of the Seventh Amendment" nor permit an appellate court to "modif[y] . . . a judgment in favor of the nonappealing

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[13] *See* 28 U.S.C. § 344 (1940); 28 U.S.C. § 876 (1940); 28 U.S.C. § 877 (1940). Congress included appellate courts after the decision in *United States v. Ill. Sur. Co.*, 226 F. 653, 664 (7th Cir. 1915), *aff'd on other grounds*, *Ill. Sur. Co. v. John Davis Co.*, 244 U.S. 376 (1917), which held that Section 2106 also applied to the courts of appeals.

party") (internal citations omitted); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 402 n.4 (2006) (noting that Section 2106 "must be exercised consistent with the requirements of the Federal Rules of Civil Procedure as interpreted by [the] Court"). Indeed, none of this Court's cases on which *amicus* relies involve a scenario in which an appellate court has modified the judgment in favor of a non-appealing party.

2. Nor did Federal Rule of Criminal Procedure 52(b) authorize the court of appeals to sua sponte increase petitioner's sentence. As the United States noted in its opening brief (at 39), nothing in either the text or history of Rule 52(b) indicates that it somehow creates an exception to the cross-appeal requirement. Rather, as this Court explained in *United States v. Olano*, 507 U.S. 725 (1993), Congress intended that "established appellate practice" would continue even after the adoption of Rule 52. *Id.* at 735. Moreover, allowing a "plain error" exception to the cross-appeal rule would be directly contrary to the principles of our adversarial system, which "is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief," *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring), and would instead effectively transform appellate courts from neutral arbiters of the parties' claims into administrative overseers.

And this Court's precedents make clear that the prohibition against modifying a judgment in favor

of a non-appealing party applies even when a portion of the judgment favoring appellants is erroneous: this Court has never applied the plain error doctrine to the detriment of an appellant. Indeed, in *Strunk v. United States*, 412 U.S. 434, 437 (1970), this Court specifically declined to correct a lower court finding favoring the petitioner because the United States had failed to file a cross-petition for certiorari. In *Strunk*, the court of appeals had found that petitioner was denied his right to a speedy trial, but it ultimately held that petitioner was entitled only to a reduction in his sentence rather than the dismissal of the charges against him. The petitioner sought review of the latter holding, but the United States did not seek review of the determination that petitioner had been denied a speedy trial. This Court found it "clear that petitioner was responsible for a large part of the 10-month delay which occurred and that he neither showed nor claimed that the preparation of his defense was prejudiced by reason of the delay," *id.* at 436, but it concluded that, "in the absence of a cross-petition for certiorari, questioning the holding that petitioner was denied a speedy trial, the only question properly before us for review is the propriety of the remedy fashioned by the Court of Appeals," *id.* at 437.

Moreover, the concerns for notice and repose that animate the general cross-appeal requirement apply with even greater force in the criminal sentencing context to weigh against the sua sponte application of the plain error rule to the detriment of the appealing party. For example, in this case, although petitioner concedes that the district court

erred in failing to sentence him to the twenty-five-year minimum required under Section 924(c), the Eighth Circuit's sua sponte action deprived him of the opportunity to brief the issues of the Eighth Circuit's authority to increase his sentence by fifteen years in the absence of a government appeal and whether the district court's error affected substantial rights and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." And if, deprived of the "crucible of meaningful adversarial testing," *United States v. Cronic*, 466 U.S. 648, 656 (1984),[13] the court of appeals errs with regard to any of the inquiries that it undertakes sua sponte, the aggrieved party may lack any meaningful recourse – a consequence with particularly grave effects in criminal cases.

The notice problem is particularly grave when a court of appeals sua sponte increases a defendant's sentence even if the court of appeals limits that activity to cases in which a panel (and perhaps a divided panel at that) thinks an error is "plain." Without providing notice to the defendant and the government, a court may in fact err in thinking a sentence to reflect "plain error." The federal sentencing laws are often complex and abstruse and whether a particular sentence is erroneous may often depend on complex factors. If a court of appeals strikes down a sentence without briefing or oral

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[13] *Amicus* contends (at 48) that petitioner had "ample notice that the lawfulness of his sentence was in question," but that assertion rests on the very premise that he seeks to prove – viz., that the court of appeals had the authority to increase his sentence when the Government had not filed its own appeal.

argument, there are few available avenues for correction. Petitions for rehearing will consume additional defendant and government resources. And an error in determining a particular defendant's sentence is unlikely to involve the kind of issue that will prompt either review *en banc* or by this Court, even if the panel opinion is incorrect.

CONCLUSION

For the foregoing reasons, as well as those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

MICHAEL J. GREENLAW, AKA MIKEY,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether, after Petitioner appealed the legality of his sentence, the absence of a cross-appeal by the United States barred the court of appeals from ordering a remand to correct the district court's plainly erroneous failure to impose the statutory mandatory-minimum sentence.

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INTEREST OF *AMICUS CURIAE*

On January 10, 2008, this Court invited Jay T. Jorgensen to brief and argue this case, as *amicus curiae,* in support of the judgment below. 128 S. Ct. 976 (2008). This brief is submitted in accordance with the Court's order.

STATUTORY PROVISION INVOLVED

The full text of 18 U.S.C. § 3742 is set out in Addendum A to this brief. Add. A, *infra*, 1a-6a. The most relevant portions of section 3742 follow:

> (a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
>
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.
>
> (b) Appeal by the Government.—The Government may file a notice of appeal in the district

court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

. . . .

(d) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

. . . .

(f) Decision and disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

. . . .

STATEMENT

The facts and proceedings below have been adequately summarized by the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

Following a jury trial, petitioner Michael Greenlaw ("Petitioner") was convicted of numerous drug and weapons offenses, including violations of 18 U.S.C. § 924(c)(1)'s prohibition on carrying a firearm during and in relation to a drug trafficking crime. It is undisputed that a jury found Petitioner guilty on two counts arising under subsection 924(c)(1) and that, in light of the jury's verdict, the district court was required by statute to sentence Petitioner to consecutive terms of five and twenty-five years' imprisonment. It is also undisputed that the trial court's failure to do so violated federal sentencing law. See *Deal* v. *United States*, 508 U.S. 129, 132-37 (1993).

By its plain language, 18 U.S.C. § 3742 gives an appellate court jurisdiction to determine the legality of a criminal sentence once any party raises the issue on appeal. Section 3742 states that when either party challenges a sentence's legality, "the court of appeals *shall* determine whether the sentence . . . was imposed in violation of law," *id.* § 3742(e)(1) (emphasis added), and that "[i]f the court of appeals determines that . . . the sentence was imposed in violation of law . . . the court *shall* remand the case for further sentencing proceedings with such

instructions as the court considers appropriate," *id.* § 3742(f)(1) (emphasis added). This reading of section 3742 is the one most faithful not only to the plain text of the statute but also to the purposes of the Sentencing Reform Act ("SRA"), of which section 3742 is a part. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, sec. 213(a), § 3742, 98 Stat. 1837, 2011.

At the time it was considering the SRA, Congress specifically recognized that then-"current law permitt[ed] appeals of sentences not authorized by law." H.R. Rep. No. 98-1017, at 90 (1984). Although both government and defendant sentencing appeals were relatively rare before section 3742 was enacted in 1984, see Br. for the United States ("Gov't Br.") 15 & n.5; Br. for the Pet'r ("Pet'r Br.") 14-15 & n.5, this was because "sentencing judges ha[d] traditionally had almost absolute discretion to impose any sentence legally available in a particular case." S. Rep. No. 98-223, at 147 (1983).

With the SRA's enactment, trial judges' sentencing discretion was reduced and Congress imposed upon the federal judiciary a duty to ensure that sentences are both sufficient and consistent. To ensure these duties are carried out, Congress empowered and obligated appellate courts that are presented with the issue of whether a sentence is legal to make that determination. As Congress noted, "[a]ppellate review is a vital part of the new sentencing system; *it serves to assure all parties that judges have complied with the sentencing laws.*" H.R. Rep. No. 98-1017, at 88 (emphasis added).

To the extent that historical sentencing practices and generalized appellate doctrines are inconsistent with the specific obligations imposed on courts by the SRA, Petitioner's and the government's reliance on them is misplaced. It likewise makes no sense to

assert, as Petitioner, the government, and *amicus curiae* National Association of Criminal Defense Lawyers ("NACDL") do, that a Justice Department official, rather than an appellate court, is the one to decide when a trial judge's unlawful sentence should be corrected. See Pet'r Br. 17-19; Gov't Br. 19-20, 42; Br. of NACDL as *Amicus Curiae* in Supp. of Pet'r ("NACDL Br.") 5-10. Indeed, any construction of section 3742 that forbids appellate courts to correct plainly unlawful sentences whose legality has been challenged by either party on appeal should be rejected as producing a result that runs directly contrary to Congress's statements and purpose.

The text and background of section 3742 make clear that, regardless of whether the government filed a notice of cross-appeal, Petitioner's appeal of his sentence obligated the court of appeals to determine the legality of Petitioner's sentence and remand for resentencing if the sentence was illegal. Thus, this Court need look only to section 3742 in affirming the judgment below.

But the result would be the same even in the absence of section 3742's specific statutory commands. Under this Court's precedents both recent and remote, the general prohibition on expanding a judgment in favor of a non-appealing party is best understood as a non-jurisdictional rule of practice that may be relaxed under exceptional circumstances—namely, where countervailing considerations outweigh the interests in notice and repose that the rule advances. The district court's egregious failure to impose the minimum sentence mandated by statute constitutes such a circumstance, and Petitioner's opaque and inadequate protest in a petition for rehearing did not diminish the court of

appeals' ability to ensure that a lawful sentence was imposed.

Not only was correction of the district court's sentencing error within the jurisdiction of the court of appeals, it was also an entirely appropriate exercise of that jurisdiction. As reflected in 28 U.S.C. § 2106, federal appellate courts have long had "supervisory power" over lower courts, a power that includes the authority to correct unlawful sentences. Appellate courts, including this Court, have exercised this supervisory authority to correct errors in lower court judgments even where the parties have failed properly to appeal or raise an issue, so long as a notice of appeal has given the court jurisdiction over the case. See *Reynolds* v. *United States*, 98 U.S. 145, 169 (1878) (finding error in sentencing that was not raised by party where "the irregularity is one which appears on the face of the record"); see also cases cited Part III.A *infra*. The need for the appellate courts' exercise of their supervisory power is particularly crucial here, where Congress has imposed a duty on the courts, and not simply on the government, to ensure that sentences comply with federal law. Cf. *Young* v. *United States*, 315 U.S. 257, 258-59 (1942).

In addition, the court of appeals properly relied on Federal Rule of Criminal Procedure 52(b) to correct (what all parties agree was) the plainly unlawful sentence imposed by the trial court. There can be no doubt, in light of Congress's purpose in enacting the SRA and subsection 924(c)(1)'s mandatory-minimum sentences, that the public's interest in lawful sentencing is a substantial right directly implicated by the district court's error. Ruling that the court of appeals was prohibited from correcting such a plain sentencing error would do violence to the language of

Rule 52(b) and would be inconsistent with reviewing courts' obligation to supervise the lower courts and to ensure that the laws enacted by Congress are followed, particularly as they pertain to the scope of a lower court's powers.

ARGUMENT

I. ONCE PETITIONER CHALLENGED THE LEGALITY OF HIS SENTENCE, SECTION 3742 REQUIRED THE COURT OF APPEALS TO OVERTURN THE PLAINLY ILLEGAL SENTENCE.

The judgment below should be affirmed because Petitioner's challenge to the legality of his sentence under 18 U.S.C. § 3742(a)(1) vested the court of appeals with both the jurisdiction and the duty to overturn the illegal sentence.[1] Once either party challenges a sentence's legality, that issue is squarely before the court of appeals, and section 3742's plain text mandates that the court remand any illegal sentence regardless of whether the remand hurts or helps the appealing party.

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[1] Because Petitioner appealed his sentence as "unreasonable," Add. B 8a-11a, his appeal fell under 18 U.S.C. § 3742(a)(1). *See* Gov't Br. 18 n.8 (defendant's "challenge to his sentence as 'unreasonable' constitutes a claim under 18 U.S.C. [§] 3742(a)(1), which authorizes a defendant to assert that his sentence was 'imposed in violation of law'" (quoting *United States* v. *Mickelson*, 433 F.3d 1050 (8th Cir. 2006))); *accord United States* v. *Trejo-Martinez*, 481 F.3d 409, 411-12 & n.1 (6th Cir. 2007) (collecting cases from the First, Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits).

A. The Plain Text Of Section 3742 Required The Court Of Appeals To Remand Petitioner's Sentence For Resentencing Once He Challenged Its Legality.

"The starting point for [the] interpretation of a statute is always its language," *Cmty. for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989), and "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). Walking through the linear progression of section 3742's text makes clear that an illegally low sentence must be remanded regardless of whether the appeal is taken by the defendant or the government.

Subsection 3742(a) provides that "[a] defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence . . . was imposed in violation of law." 18 U.S.C. § 3742(a)(1). Similarly, subsection 3742(b) provides that "[t]he Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence . . . was imposed in violation of law." *Id.* § 3742(b)(1). Section 3742 further provides that "[i]f a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals" the relevant record in the case. *Id.* § 3742(d). "Upon review of the record, the court of appeals shall determine whether the sentence . . . was imposed in violation of law." *Id.* § 3742(e)(1).[2] Finally, "[i]f the court of appeals

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[2] Although this Court suggested that it was excising the entirety of subsection (e) in *United States* v. *Booker*, 543 U.S. 220, 245 (2005) ("We conclude that [18 U.S.C. § 3553(b)(1)] must be severed and excised, as must one other statutory section,

determines that . . . the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate." *Id.* § 3742(f)(1).[3]

Section 3742 thus contains *no* language suggesting that the reviewing court can remand a plainly illegally low sentence only if the government appeals. Congress instructed the courts of appeals to provide the correct answer when a party places the issue of a sentence's legality in question and did not limit the courts of appeals to providing an answer that would benefit the side that filed a notice of appeal.[4] Thus,

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§ 3742(e), which depends upon the Guidelines' mandatory nature."); *id.* at 260, 265, language in this Court's subsequent decisions indicates that *Booker* excised only the portion of subsection (e) that directed courts to apply a *de novo* standard of review, *see Rita* v. *United States*, 127 S. Ct. 2456, 2471 (2007) (Stevens, J., joined in part by Ginsburg, J., concurring) ("*Booker* excised the portion of § 3742(e) that directed courts of appeals to apply the *de novo* standard. Critically, we did not touch [other] portions of § 3742(e) . . . ." (internal citation omitted)).

[3] The use of "shall" indicates that section 3742 sets forth an unequivocal mandate for reviewing courts. *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2531-32 (2007). This does not mean that a court of appeals is under an obligation to independently research sentencing issues that are not raised by the parties, however. Rather, the broad mandate of section 3742 should be interpreted to require the reviewing court to remand an illegally low sentence in the absence of a government cross-appeal at least where that sentence is plainly illegally low (a condition indisputably met in this case). This interpretation is in harmony with Federal Rule of Criminal Procedure 52(b). *See* Part III.B *infra*.

[4] Indeed, section 3742's clear mandate is consistent with 18 U.S.C. § 3553(a), which embodies Congress's determination that the fairness, integrity, and reputation of judicial proceedings are

once Petitioner challenged his sentence's legality, the court of appeals was under an obligation to remand the sentence because it was plainly illegally low. Cf. *United States* v. *Boone*, 933 F.2d 1539 (4th Cir. 1993) (unpublished table decision), *available at* 1993 WL 192513, at *3 (once government withdrew cross-appeal of defendant's sentence, defendant "withdrew his appeal on the sentencing issue so as not to expose himself to yet a longer sentence than that which he was given").

Contrary to the government's assertions otherwise, see Gov't Br. 20 n.9, Congress's prior use of two very different sentencing provisions, see Gov't Br. 15 n.5, affirms section 3742's plain-text meaning. Unlike section 3742, both of these historic provisions explicitly stated that a court of appeals could not increase a defendant's sentence in the absence of a government sentencing appeal.[5] Congress chose not

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called into question when similarly situated defendants receive disparate sentences for the same illegal conduct. *See* 18 U.S.C. § 3553(a)(6) (requiring the sentencing court to "consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

[5] Organized Crime Control Act of 1970, Pub. L. No. 91-452, sec. 1001(a), § 3576, 84 Stat. 922, 950-51 ("[A] sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction."), *repealed by* SRA § 212(2), 98 Stat. at 1987; Controlled Substances Act, Pub. L. No. 91-513, § 409(h),

to adopt this limiting language when it enacted the SRA, but rather mandated that courts review appealed sentences for their legality and remand if they are found to be illegal. See 18 U.S.C. § 3742(e)-(f). Indeed, Congress repealed these prior sentencing provisions at the same time it enacted section 3742. See Gov't Br. 15 n.5. Accordingly, section 3742's text cannot possibly bear the construction the government places on it. See 2B Norman J. Singer, *Sutherland Statutes and Statutory Construction* §§ 51:2, 51:4 (6th ed. 2007).

Nothing in *United States* v. *Ruiz*, 536 U.S. 622 (2002), is to the contrary. Although *Ruiz* establishes that section 3742 is "jurisdiction[al]" in the limited sense that it delineates the types of sentencing claims that appellate courts have the authority to hear, *id.* at 626-28, *Ruiz* does not mention, let alone dispute, section 3742's clear text mandating that once either party challenges the legality of the sentence, the reviewing court must determine whether the sentence is illegal and, if so, remand.

The government argues that a reviewing court cannot remand an illegally low sentence if the government does not cross-appeal. The government attempts to find a textual basis for this argument by pointing to the fact that subsection 3742(a) sets out one class of sentencing claims for which the defendant may file a notice of appeal, while a different subsection, subsection (b), sets out another class of sentencing claims for which the government may file a notice of appeal. Gov't Br. 19.[6] That

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84 Stat. 1236, 1268 (1970) (same), *repealed by* SRA § 219, 98 Stat. at 2027.

[6] To the extent the government means to suggest that the specific types of sentencing claims the government may appeal

Congress set forth these appellate rights in different statutory subsections is beside the point. As discussed *supra* at 10-12, once one party appeals a sentence's legality, that triggers a particular set of actions and creates an obligation in the reviewing court. The clerk submits the relevant portions of the sentencing record, and "[u]pon review of the record, the court of appeals shall determine whether the sentence . . . was imposed in violation of law." 18 U.S.C. § 3742(e)(1). Section 3742 also makes clear that "[i]f the court of appeals determines that the sentence . . . was imposed in violation of law . . . , the court shall remand the sentence for further sentencing proceedings with such instructions as the court considers appropriate." *Id.* § 3742(f)(1). These statutory instructions contain no language stating that the reviewing court can increase a sentence only if the government appeals.

The text of subsection (f)(2) also demonstrates that the government's interpretation is incorrect. That subsection states:

> If the court of appeals determines that . . . the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is

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are different from the types of sentencing claims defendants may appeal under section 3742, *see* Gov't Br. 19 ("Section 3742 . . . establishes which particular party—the defendant or the government—can appeal which class of claim."); *id.* at 16, that is incorrect. Although section 3742 sets out four specific types of claims that defendants may appeal, and four types the government may appeal, three of the four types are identical for each party, *compare* 18 U.S.C. § 3742(a)(1), (a)(2), (a)(4), *with id.* § 3742(b)(1), (b)(2), (b)(4), while the fourth type of defendant claim is a mirror image of the government's fourth type of claim, *compare id.* § 3742(a)(3), *with id.* § 3742(b)(3). *See supra* at 1-2.

> based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—
>
> (A) if it determines that the sentence is too high and *the appeal has been filed under subsection (a)*, it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate . . . ;
>
> (B) if it determines that the sentence is too low and *the appeal has been filed under subsection (b)*, it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate . . . .

18 U.S.C. § 3742(f)(2) (emphases added). Thus, Congress has made clear that for certain types of sentencing appeals not at issue here, the identity of the party that filed the appeal makes a difference in whether a remand may be ordered. But because Congress did not include similar language in subsection (f)(1) (where reviewing courts determine the legality of the sentence), the necessary negative implication is that Congress did not expect the identity of the party who appealed the sentence to matter when the reviewing court determines the sentence's legality.[7]

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[7] Furthermore, because section 3742 allows both defendants and the government to appeal, while 18 U.S.C. § 3731 "authorizes appeals only 'by the United States,'" Gov't Br. 22 (quoting 18 U.S.C. § 3731), the government improperly relies upon case law concerning *section 3731* in arguing that a

B. The Legislative History Of Section 3742 Supports The Section's Plain Text.

Where, as here, the words of the statute are unambiguous, the "'judicial inquiry is complete.'" *Germain*, 503 U.S. at 254 (quoting *Rubin* v. *United States*, 449 U.S. 424 (1981)). Nonetheless, Petitioner and the government attempt to introduce ambiguity by emphasizing that historically there was a relative rarity of sentencing appeals. Pet'r Br. 14-15 & n.5; Gov't Br. 15 & n.5.

As an initial matter, this argument ignores that Congress *specifically* recognized that at the time it was considering the SRA, then-"current law permitt[ed] appeals of sentences not authorized by law." H.R. Rep. No. 98-1017, at 90.[8] See *United States* v. *Booker*, 543 U.S. 220, 306 n.5 (2005) (Scalia, J., dissenting in part) (recognizing that even before

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government cross-appeal is required for the court to be able to remand an illegally low sentence appealed by the defendant under *section 3742*. *Id.* at 21-22.

[8] Although Congress went on to list only situations where defendants had appealed illegal sentences under then-current law, *see* H.R. Rep. No. 98-1017, at 90, Congress appears to have believed that both the government and defendants could appeal illegal sentences under then-current law:

> *Subsection (a) permits the defendant or the Government to appeal a sentence on any of three grounds.* Subsection (a)(1) permits appeal on the ground that the sentence resulted from an incorrect application of the sentencing guideline.
>
> Subsection (a)(2) permits appeals of sentences that are imposed other than in accordance with the Federal Rules of Criminal Procedure. *Subsection (a)(3) authorizes appeals of sentences that violate the Constitution or laws of the United States. These two provisions carry forward that part of the current law permitting appeals of sentences not authorized by law.*

Id. (emphases added).

section 3742 was enacted, "[c]ourts of appeals had of course always" "determine[d] whether a sentence 'was imposed in violation of law'" (quoting 18 U.S.C. § 3742)); *id.* at 307 ("Before the Guidelines, federal appellate courts had little experience reviewing sentences for anything but legal error.").

Moreover, while Petitioner and the government correctly observe that there was a relative rarity of both government *and* defendant sentencing appeals before section 3742 was enacted in 1984, see Pet'r Br. 14-15 & n.5; Gov't Br. 15 & n.5, they fail to note that the reason for this phenomenon supports *amicus's* interpretation of the statute. "The reason given for unavailability of appellate review of sentences under [then-]current law [wa]s the fact that sentencing judges ha[d] traditionally had almost absolute discretion to impose any sentence legally available in a particular case." S. Rep. No. 98-223, at 147; *accord* S. Rep. No. 97-307, at 1225 (1981); S. Rep. No. 98-225, at 150 (1983). It was Congress's conclusion that this broad trial court discretion was a substantial cause of the "uncertainty and inequity of the [then-]current sentencing-parole process." S. Rep. No. 97-307, at 8.

However, these circumstances and the minimal appellate review they engendered were eliminated when Congress passed the SRA, creating a new Sentencing Guidelines system that "entirely revamped" "[t]he sentencing system." *Id.*; see also Gov't Br. 16 (recognizing that Congress "overhaul[ed] federal sentencing").

As Congress explained, "[t]he sentencing provisions of the Code represent a complete revision and reformation of sentencing law *to assure that sentences are fair both to defendants and to the public. The provisions are designed to achieve a rationality,*

uniformity, and fairness that simply have not existed before." S. Rep. No. 97-307, at 10 (1981) (emphasis added); see also *id.* at 11 ("The system is designed to promote general uniformity and fairness . . . ."); *id.* at 1225 ("The sentencing provisions of the reported bill . . . . are intended to afford enough guidance and control of the exercise of that discretion to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing."); *accord* S. Rep. No. 98-223, at 147; S. Rep. No. 98-225, at 150.

Furthermore, Congress recognized that "[a]ppellate review is a vital part of the new sentencing system; it serves to assure all parties that judges have complied with the sentencing laws." H.R. Rep. No. 98-1017, at 88; see also S. Rep. No. 98-225, at 151 ("[M]ost Western nations . . . consider review at the behest of either the defendant or the public to be a fundamental precept of a rational sentencing system, and the Committee considers it to be a critical part of the foundation for the bill's sentencing structure."); H.R. Rep. No. 98-1017, at 89 ("appellate review of sentences will further the goals of individualizing justice, eliminating the perception that the current system is unfair, and substantially reducing sentencing disparity"); *id.* ("Appellate court scrutiny . . . inject[s] the critical element of systematic review of the application of judicial discretion and reduces the chances that the sentencing guidelines will result in arbitrary sentences."); *id.* ("Appellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the

guidelines."); *accord* S. Rep. No. 97-307, at 1226; S. Rep. No. 98-223, at 148; S. Rep. No. 98-225, at 155.[9]

In particular, Congress explained that "section 3742 create[d] for the first time a comprehensive system of review of sentences that . . . provid[es] adequate means for correction of erroneous and clearly unreasonable sentences." S. Rep. No. 98-223, at 152; *accord* S. Rep. No. 98-225, at 155; S. Rep. No. 97-307, at 1229. And, as Congress further recognized, "[i]t is an anomaly to provide for appellate correction of prejudicial trial errors and not to provide for appellate correction of incorrect or unreasonable sentences." S. Rep. No. 98-223, at 147; *accord* S. Rep. No. 97-307, at 1225; S. Rep. No. 98-225, at 150. Even the government concedes that Congress in 1984 "considerably revised its approach to appellate review of sentences." Gov't Br. 16.

Given Congress's broad-sweeping sentencing reforms, it should come as no surprise that Congress imposed no restrictions in its explanation of what an appellate court is to do when reviewing the legality of a sentence appealed by either party:

> Under subsection (d) [now (e)], upon review of the record, the court of appeals is to determine whether the sentence was imposed in violation of law . . . .

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[9] Indeed, before section 3742 was enacted, this Court recognized that "it may be said with certainty that history demonstrates that the common law never ascribed such finality to a sentence as would prevent a legislative body from authorizing its appeal by the prosecution. Indeed, countries that trace their legal systems to the English common law permit such appeals." *United States* v. *DiFrancesco*, 449 U.S. 117, 134 (1980) (citing sources).

> Under subsection (e) [now (f)], if the court of appeals finds that the sentence was not imposed in violation of law, . . . it is to affirm the sentence.
>
> If the court determines that the sentence was imposed in violation of law . . . it is required to remand the case for further sentencing proceedings or correct the sentence.

S. Rep. No. 98-225, at 154; *accord* S. Rep. No. 98-223, at 151.

Petitioner and the government ignore the context of section 3742's enactment and instead focus upon isolated snippets in the legislative history stating that "'[i]f only the defendant could appeal his sentence, there would be no effective opportunity for the reviewing courts to correct the injustice arising from a sentence that was patently too lenient.'" Pet'r Br. 16 (alteration in original) (quoting S. Rep. No. 98-225, at 151); see also Gov't Br. 21 ("the Senate Report evidences an understanding that, unless Congress authorized the government to appeal, the appellate court 'could only reduce excessive sentences but not enhance inadequate ones'" (quoting S. Rep. No. 98-225, at 151)). However, these quotations merely reflect Congress's self-evident observation that if *only* defendants could initiate sentencing appeals, the courts of appeals would be unlikely to review the most egregious failures to impose an adequate sentence because "it is unlikely that a defendant would choose to appeal, on the basis of alleged excessiveness, a sentence deemed by the reviewing court as so inadequate as to warrant enhancement." S. Rep. No. 98-225, at 151 n.370. This statement of a criminal defendant's obvious motivations does nothing to undermine the clear context and

legislative history supporting section 3742's plain-text meaning.

In sum, the SRA was designed and intended to work a radical change in federal sentencing imposition and review. It removed most sentencing discretion from the trial judge's hands and obligated the federal judiciary to impose sentences that are both sufficient and consistent, building upon preexisting precedent that courts cannot impose a sentence in violation of law. Given this context, Petitioner's and the government's reliance on standard appellate doctrines that shy away from reviewing judgments not challenged by those they harm and on more specific rules disfavoring challenges to sentences are wholly misplaced. Both the general and specific doctrines arise from the traditional appellate deference to the discretion afforded the judge as trier and sentencer and to the party's control of its case. Neither of these traditional justifications has any application here.

Congress created the SRA regime to limit trial judges' discretion and to protect the public's interest in sufficient and non-disparate sentences. The only way to effectuate those objectives is by empowering and obligating appellate courts presented with the issue of whether the sentence is legal to decide the issue regardless of whether the determination helps or hurts the appealing party. Indeed, any interpretation of section 3742 that *forbids* appellate courts to correct plainly unlawful sentences once either party has brought the sentence's legality into dispute should be rejected, not only because such an interpretation is contrary to section 3742's plain text, but also because it would produce a result that runs contrary to Congress's purpose.

C. Because Petitioner Challenged His Sentence's Legality, The Solicitor General's Failure To Approve A Cross-Appeal Is Irrelevant.

Subsection 3742(b) states that "[t]he Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." 18 U.S.C. § 3742(b). Petitioner, the government, and NACDL rely on this subsection to argue that the lack of the Solicitor General's approval for a government cross-appeal prevented the court of appeals from giving the obvious answer to Petitioner's query whether his sentence was imposed according to law. Pet'r Br. 17-19; Gov't Br. 19-20, 42; NACDL Br. 5-10. This interpretation would unduly limit this Court's and appellate courts' oversight of lower court decisions, in contravention of Congress's plain intent.

Initially, the absence of Solicitor General approval for a cross-appeal is irrelevant to this case. As discussed *supra* at 10-12, once a defendant challenges his sentence's legality on appeal, subsections 3742(e) and (f) require the court of appeals to determine whether the sentence is illegal and remand for correction any illegally low or high sentence. As further discussed in Part I.B *supra*, the SRA was designed to end what Congress saw as inadequate and inconsistent sentences. One of Congress's principal means of doing this was to provide appellate oversight of lower court sentencing decisions. Once a defendant appeals the legality of his sentence, the government cannot prevent the appellate courts from fulfilling the duty imposed by Congress to correct errant trial court sentences and to ensure that they comply with explicit federal law, particularly when

the sentences are outside of the statutory range Congress prescribed.

The court of appeals' remand of Petitioner's illegal sentence was also fully consistent with the constitutional role of the federal courts. The lower courts play a limited role in reviewing laws set out by Congress, *e.g.*, *Stewart Org., Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 26 (1988), and this limitation is nowhere more appropriate than in the instance of sentencing for federal crimes. "It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.); see also *Dowling* v. *United States*, 473 U.S. 207, 214 (1985); *Ex Parte United States*, 242 U.S. 27, 42 (1916). Thus, when courts impose a sentence that is beyond the limits laid down by Congress, their actions should be corrected once properly brought before a reviewing court.

It is of no moment that the government did not seek correction of the error in this case. Indeed, even when the government confesses error, courts retain a duty to perform their "judicial function" and determine "the proper administration of the criminal law." *Young*, 315 U.S. at 258-59. This is the case because "[t]he public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding." *Id.* "That interest is entrusted to [the court's] consideration and protection as well as that of the enforcing officers," such that "the proper administration of the criminal law cannot be left merely to the stipulation of parties." *Id.*; *accord U.S. Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993); *Swift & Co.* v. *Hocking Valley Ry.*, 243 U.S. 281, 290 (1917); *Town of S. Ottawa* v. *Perkins*, 94 U.S. 260, 267 (1876).

Petitioner, the government, and NACDL argue that the prosecutorial discretion of the Executive Branch should control whether an unlawful sentence is corrected. Pet'r Br. 18-19; Gov't Br. 42-43; NACDL Br. 8-9. However, this Court has questioned whether unfettered prosecutorial discretion in the sentencing area would be constitutional. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 391 n.17 (1989) ("Indeed, had Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally had assigned judicial responsibilities to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch.").

Additionally, NACDL's argument that prosecutorial discretion extends to later decisions regarding the punishment for a conviction is clearly incorrect. NACDL Br. 9-10. Although the government has the discretion "to nullify some provisions of law by the mere failure to prosecute," that discretion ends as soon as a criminal prosecution is concluded. *Davis* v. *United States*, 512 U.S. 452, 464-65 (1994) (Scalia, J., concurring) ("[O]nce a prosecution has been commenced and a confession introduced, the Executive assuredly has neither the power nor the right to determine what objections to admissibility of the confession are valid in law."). The government's decision not to seek enforcement of a statutory sentencing requirement is not an excuse for the court to do the same, particularly when the statute limits judicial discretion. *Id.* ("We shirk our duty if we systematically disregard that statutory command simply because the Justice Department systematically declines to remind us of it.").

Moreover, the pragmatic considerations underlying the government's plea for prosecutorial discretion are irrelevant in a case, such as this, where the defendant has placed the legality of his sentence before the court of appeals. Although the government sometimes does not appeal adverse rulings in order to conserve prosecution resources and to avoid clogging of judicial dockets,[10] these concerns have no relevance once the defendant has independently chosen to challenge his sentence's legality. The defendant's appeal brings the issue squarely before the reviewing court to be answered, and the government must have one of its lawyers write a brief on the sentencing issue, argue the issue before the court of appeals, and handle any resentencing at the district court. Accordingly, the absence of Solicitor General approval when the defendant appeals his sentence is not a relevant basis for requiring the court of appeals to ignore the obvious answer to the question before it.[11]

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[10] *See United States* v. *Mendoza*, 464 U.S. 154, 161 (1984) ("[T]he Solicitor General considers a variety of factors, such as the limited resources of the government and the crowded dockets of the courts, before authorizing an appeal.").

[11] Petitioner and the government quote a Senate report stating that allowing courts of appeals to increase a sentence upon a defendant's appeal would place an "'undesirable strain'" on the defendant. Pet'r Br. 19 (quoting S. Rep. No. 98-225, at 151 n.370); Gov't Br. 21 (same). However, this concern does not override section 3742's plain text. Moreover, Congress's decision to allow the courts of appeals to determine the legality of sentences appealed by either party places no additional strain on the defendant's right to appeal. The defendant does not know whether the government will file a notice of cross-appeal until after the time for the defendant to file his notice of appeal has passed. *Compare* Fed. R. App. P. 4(b)(1)(A) ("a defendant's notice of appeal must be filed in the district court within 10

The government does not explain why the Solicitor General did not authorize a cross-appeal in this case or how the government's interest was served by that omission. The government cannot claim that there would have been "appellate risk to seek to correct it on appeal" or that "the ultimate outcome of a resentencing proceeding may be unpredictable and not necessarily favorable to the government," Gov't Br. 43-44, since Supreme Court precedent clearly held that Petitioner's sentence was below the statutory minimum. See *Deal*, 508 U.S. at 137.

In sum, the plain text and historical context of section 3742 firmly establish the court of appeals' authority to notice and correct the egregious sentencing error in this case.

II. THE ABSENCE OF A CROSS-APPEAL DID NOT DEPRIVE THE COURT OF APPEALS OF THE AUTHORITY TO ORDER THAT PETITIONER'S UNLAWFUL SENTENCE BE CORRECTED.

Petitioner urges the Court to resolve the open question of whether the general bar against modifying judgments in favor of a nonappealing party

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days"), *with id.* 4(b)(1)(B) (the government's "notice of appeal must be filed in the district court within 30 days"). *See* S. Rep. No. 98-223, at 152 ("[T]he Committee intends that the Federal Rules of Appellate Procedure be applicable to a proceeding under this section."); *accord* S. Rep. No. 97-307, at 1229; S. Rep. No. 98-225, at 155. Accordingly, a defendant makes his choice to appeal his sentence before he knows whether the government will also appeal. Moreover, because the Solicitor General faces substantial time pressure in deciding whether to authorize appeals, the government attorney in any given case ordinarily files a protective notice of cross-appeal. Thus, the defendant often will not know until after he has perfected his appeal whether the government will actually proceed with its cross-appeal.

is a "strictly jurisdictional" rule that places "an unqualified limit on the power of appellate courts." *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 480 (1999). The Court need not answer that question, for section 3742 makes clear that the absence of a cross-appeal was not a jurisdictional impediment in this case. But if the Court were to resolve the question, it should answer in the negative. None of this Court's cases cited by Petitioner or the government have described a cross-appeal as a jurisdictional prerequisite to expanding the relief afforded an appellee. This Court's recent precedents rejecting the imprecise use of the term "jurisdictional" strongly suggest that this label—with the unavoidable and at times inefficient consequences that it carries—does not apply to the filing of a cross-appeal. The cross-appeal requirement is instead best construed as a non-jurisdictional rule of practice that is properly relaxed where, as here, countervailing considerations outweigh "the institutional interests in fair notice and repose that the rule advances." *Id.*

A. The General Prohibition Against Modifying Judgments In Favor Of A Nonappealing Party Is A Rule Of Practice Subject To Exceptions.

The only event necessary to vest the court of appeals with plenary jurisdiction over a case is the timely filing of an initial notice of appeal that complies with the requirements of Federal Rule of Appellate Procedure 3(c). See 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3904, at 218 (2d ed. 1992 & Supp. 2007) ("The jurisdiction of the court of appeals is established by the timely filing of the *first* notice of appeal.") (emphasis added); *Smith* v. *Barry*, 502 U.S. 244, 248 (1992) ("Rule 3's dictates are jurisdictional in nature, and their

satisfaction is a prerequisite to appellate review."). It is this "first" or initial notice of appeal that the Court has described as "an event of jurisdictional significance" because that filing "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam); see also *Scarborough* v. *Principi*, 541 U.S. 401, 413 n.3 (2004) (calling the notice of appeal "the filing that triggers appellate-court jurisdiction over the case"). But once the initial notice of appeal has invoked the appellate court's jurisdiction over the parties and the case, that "court has the authority to fully adjudicate the appeal before it." *Mendocino Envtl. Ctr.* v. *Mendocino County*, 192 F.3d 1283, 1298 (9th Cir. 1999).

Petitioner and the government gloss over this fundamental distinction between an initial notice of appeal and subsequent cross- or separate appeals. Perhaps as a result, they raise unwarranted concerns that affirming the Eighth Circuit's decision would sanction "free-floating jurisdiction [for] the courts to correct sentencing errors," Gov't Br. 18, or authorize appellate courts to assert jurisdiction even where no notice of appeal (or petition for certiorari) is filed. Pet'r Br. 25 n.14. But the Eighth Circuit did not issue the extreme holding Petitioner and the government fear. Instead, the court of appeals relied on the controlling principle that an appellate court with jurisdiction over the issues and the parties before it is not deprived of the authority to afford a specific measure of relief to a nonappealing party

simply because that party did not file a cross-appeal.[12]

This principle both flows from and accords with this Court's longstanding recognition that the bar on modifying judgments in favor of a nonappealing party is a "rule of practice" that may be relaxed for good cause. See *Langnes* v. *Green*, 282 U.S. 531, 538 (1931). The Court in *Langnes* conducted a careful analysis of its prior decisions (including *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U.S. 52 (1927), upon which Petitioner relies here, Pet'r Br. 10), in concluding that its cases on point "simply announce[d] a rule of practice which generally has been followed; but none of them deny the *power* of the court to review objections urged by respondent, although he has not applied for certiorari, if the court deems there is good reason to do so." *Langnes*, 282 U.S. at 538.

This assessment was not, as the government would have it, an offhand statement that the Court went on to reject just six years later in *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185 (1937). See Gov't Br. 32-33. Although *Morley* described the issue before it as "[t]he power of an appellate court to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal," 300 U.S. at

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[12] *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88 (1994), is not to the contrary. The government cites that case to support its contention that courts of appeals lack jurisdiction to award the government relief "[a]bsent an appeal by the government, duly authorized by the official designated by Congress." Gov't Br. 20. Critically, however, *NRA Political Victory Fund* did not involve cross- or multiple petitions for certiorari; only the FEC had sought certiorari there. Accordingly, once it concluded that it lacked jurisdiction over the only request for review before it, the Court had no choice but to dismiss the case in its entirety.

187, the context reveals that this Court was not referring to its jurisdiction. The *Morley* Court never again referred to the "power of an appellate court," and the remainder of the opinion is couched in terms of what an *appellee* may or "may not do in the absence of a cross-appeal"—a discussion during which it cited *Langnes* with approval. *Id.* at 191. *Morley*, accordingly, does not suggest that the general rule against modifying judgments in favor of a nonappealing party amounts to "an unqualified bound on the jurisdiction of the courts of appeals." *Neztsosie*, 526 U.S. at 480.

Decisions of the courts of appeals provide additional evidence that the cross-appeal requirement has been—and is best—understood as a flexible "rule of practice." Various circuits have adhered to the rule-of-practice position for decades. See *Mendocino Envtl. Ctr.*, 192 F.3d at 1298 & n.27 (collecting cases from, among others, the Second, Fourth, Ninth and D.C. Circuits).[13] Moreover, many of these courts reaffirmed that the cross-appeal requirement represents a rule of practice after this Court's decisions in *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), and *Neztsosie*, 526 U.S. 473. See, *e.g.*, *Am. Roll-On Roll-Off Carrier, LLC* v. *P & O Ports Balt., Inc.*, 479 F.3d 288, 295 (4th Cir. 2007); *Carlson* v. *Principal Fin. Group*, 320 F.3d 301, 309 (2d Cir. 2003); *Lee* v. *Burlington N. Santa Fe Ry.*, 245 F.3d 1102, 1107 (9th Cir. 2001).

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[13] The circuits remain sharply divided on the jurisdictional status of the rule. *See Marts* v. *Hines*, 117 F.3d 1504, 1507-08 (5th Cir. 1997) (Garwood, J., dissenting) (en banc) (collecting cases). This Court in *Neztsosie* noted both the conflict and the fact that some courts of appeals had issued inconsistent opinions on the question. 526 U.S. at 480 n.2.

Interpreting the rule as a non-jurisdictional matter of practice is fully consistent with *Torres*. The *Torres* Court held that, in combination with the time limits in Federal Rule of Appellate Procedure 4, Rule 3(c)'s requirement that the notice of appeal specify the names of the appealing parties was a jurisdictional limitation that could not be relaxed. But even given an expansive reading, *Torres* stands at most for the proposition that "a court of appeals always lacks jurisdiction to afford relief to a *party* who is not named in a notice of appeal." 15A Wright et al., *supra* § 3904, at 228 (emphasis added). *Torres* is therefore distinguishable from situations "involving jurisdiction over particular claims or issues in a case in which the court has jurisdiction over all of the relevant parties." *Mendocino Envtl. Ctr.*, 192 F.3d at 1298 n.27; see also *United States* v. *Tabor Court Realty Corp.*, 943 F.2d 335, 344 (3d Cir. 1991). That is the situation here, where both Petitioner and the government were parties named in the initial notice of appeal and thus were within the Eighth Circuit's jurisdiction.

Treating the cross-appeal requirement as a non-jurisdictional rule of practice is not only a better reading of this Court's precedent, it is also the better approach. As one leading treatise observes, "there is an astonishing lack of reasoned explanation for the cross-appeal requirement." 15A Wright et al., *supra* § 3904, at 206. While a rule requiring a cross-appeal before expanding the judgment might have "some value in fostering repose, identifying the issues to be met, [and] shaping the progress of the appeal," *id.*, the "requirement should be administered with substantial flexibility" in light of the "uncertainties" surrounding its value. *Id.*

As Judge Posner has noted, treating a cross-appeal as a jurisdictional requirement carries a number of consequences, "all of which are bad." *Coe* v. *County of Cook*, 162 F.3d 491, 497 (7th Cir. 1998). Requiring a cross-appeal before a court may consider both sides of the issues before it "makes federal law more complicated than it has to be." *Id.* It also "increases paperwork, by requiring the appellee as well as the appellant to file a notice of appeal"; "increases the number of remands"; "trips up the unwary"; and "multiplies the number of cross-appeals, because appellees frequently confuse defending a judgment on new grounds, which doesn't require a cross-appeal, with seeking to alter the judgment in their favor." *Id.* Recognizing that the courts—not Congress—created the idea that a cross-appeal is jurisdictional, Judge Posner has called on the Seventh Circuit to "abandon[ ] the rule as a rule of jurisdiction." *Id.* at 498.

This Court's recent decision in *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), emphasizes that, in determining whether a particular requirement is jurisdictional, this Court will consider the consequences of that rigid classification. The consequences of the rule Petitioner proposes would be severe. For example, if a rule like the cross-appeal requirement is jurisdictional, it can be raised by any party at any time, including for the first time in this Court. In addition, the jurisdictional label would oblige courts to enforce compliance on their own motion and foreclose arguments based on equity, waiver, consent, or estoppel. See *Ins. Corp. of Ire., Ltd.* v. *Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702 (1982); see also Scott Dodson, *Mandatory Rules* (forthcoming Stanford Law Review 2008)

(manuscript at 5), *available at* http://papers.ssrn.com/sol3/papers.cfm?/abstract_id=1095352.

Arbaugh itself is instructive in this regard. In that case, the Court pointed to three "consequences" that would flow from classifying Title VII's employee-numerosity requirement as "a determinant of subject-matter jurisdiction, rather than an element of [the plaintiff's] claim for relief." 546 U.S. at 513-14. Federal courts, including this Court, would be compelled to raise the issue on their own motion; trial judges would have to resolve contested facts that would otherwise be determined by a jury; and courts would be forced to dismiss complaints in their entirety, rather than retaining the discretion to exercise supplemental jurisdiction over remaining claims. *Id.* at 514. Anticipating the potential for "unfairness" and "waste of judicial resources" entailed by the jurisdictional classification, this Court held that "the sounder course" was to reject the jurisdictional label and "leave the ball in Congress' court." *Id.* at 515.

The similarly undesirable consequences of the jurisdictional label in this setting are starkly evidenced by the very scenario that NACDL highlights—a situation where the government has appealed but "the defendant has failed to [cross-] appeal a sentence that is unlawfully long." NACDL Br. 16. If the cross-appeal requirement were jurisdictional, the defendant's failure to file a cross-appeal in this scenario should also categorically bar the appellate court from "decreasing an unlawful sentence," *id.* at 18, either on its own motion or at the defendant's request—a fundamentally unfair outcome. NACDL thinks it could avoid this consequence because the separation of powers and due process concerns that bar courts from increasing

sentences *sua sponte* do not apply in the other direction. *Id.* at 16-18. The government disagrees. See Gov't Br. 22-23 (explaining its view that courts of appeals likewise lack "jurisdiction to grant sentencing relief in favor of a defendant if only the government has filed a notice of appeal"). But treating the cross-appeal requirement as a rule of practice would avoid both the one-way ratchet advocated by NACDL and the enforcement of patently unlawful sentences that the government is prepared to tolerate.

B. Neither The Time Limits For Filing Cross-Appeals Nor The Filing Of A Cross-Appeal Itself Are Jurisdictional Requirements Under This Court's Recent Precedents.

This Court has in recent years sought to rein in the "profligate" and sometimes imprecise use of the term "jurisdictional," "'a word of many, too many, meanings.'" *Arbaugh*, 546 U.S. at 510 (citation omitted). The line of decisions culminating in *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), has clarified two important points. First, the label "jurisdictional" should be used "only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004); see also *Eberhart* v. *United States*, 546 U.S. 12, 16 (2005) (per curiam). Second, time prescriptions may be jurisdictional when contained in a statute, see *Bowles*, 127 S. Ct. at 2363-64, but are otherwise non-jurisdictional claim-processing rules that will be enforced when properly invoked. *Eberhart*, 546 U.S. at 19; *Kontrick*, 540 U.S. at 456.

Under these two related principles, the time limits in Federal Rule of Appellate Procedure 4(b)(1) for

filing cross-appeals in criminal cases are not jurisdictional. Unlike the prescription at issue in *Bowles*, these limits are not statutorily based. See 127 S. Ct. at 2363-64. The government correctly recognizes that, because the time limits for filing both initial notices of appeal and notices of cross-appeal are prescribed only by the Federal Rules of Appellate Procedure, those limits are not jurisdictional. Gov't Br. 24-26. This conclusion finds further support in the decisions of the courts of appeals, one of which appreciated the effect of *Kontrick* on Rule 4(b) even prior to the subsequent ruling in *Bowles*. See *United States* v. *Sadler*, 480 F.3d 932, 935-37 (9th Cir. 2007); *accord United States* v. *Garduño*, 506 F.3d 1287, 1290-91 (10th Cir. 2007); *United States* v. *Martinez*, 496 F.3d 387, 388-89 (5th Cir.) (per curiam), *cert. denied*, 128 S. Ct. 728 (2007).

The question then becomes whether the filing of *some* cross-appeal is a "jurisdictional" requirement even though filing a *timely* cross-appeal is not. There is no sound basis for drawing such a distinction. The general cross-appeal requirement at issue in *Neztsosie* is a product of this Court's decisions and is not set forth in any federal statute. Under *Kontrick*, *Eberhart*, and *Bowles*, therefore, the limitation is no different than a time prescription contained in a rule of court procedure and is not jurisdictional.

Petitioner and the government also point to subsection 3742(b) in arguing for a jurisdictional cross-appeal requirement, but that statute by its terms covers appeals, not cross-appeals. Contrary to the suggestion that section 3742 prevents a court of appeals from determining whether a sentence is lawful once that issue has been appealed, the plain text of section 3742 *requires* a court of appeals to correct an unlawful sentence when an appealing

party has placed the legality of the sentence at issue. See Part I.A *supra*. Accordingly, section 3742 neither serves as a jurisdictional barrier to the court of appeals' action under the facts of this case, nor does it convert the filing of a cross-appeal into a jurisdictional prerequisite to relief in criminal appeals as a general matter.

C. The Court Of Appeals Had Good Reason To Relax The Cross-Appeal Requirement In This Case.

For the reasons set forth in Part II.A *supra*, the Court should conclude that the bar on modifying a judgment in favor of a non-appealing party is a non-jurisdictional rule of practice subject to exceptions. The relevant question is thus whether the court of appeals had "good reason" to deviate from the rule in this case. *Langnes*, 282 U.S. at 538. Under the factors that appellate courts weigh in deciding whether to relax this requirement, it did.[14]

Petitioner put the lawfulness of his sentence in play when he challenged it as "unreasonable." See *supra* at 9 n.1. Petitioner was also on notice that the mandatory consecutive sentence lingered as an issue because the government specifically preserved an objection to that ruling in the district court, J.A. 62-

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[14] The factors that the Ninth Circuit considers are instructive: (1) the interrelatedness of the issues on appeal and cross-appeal, (2) whether the nature of the district court opinion should have put the appellee on notice of the need to file a cross-appeal, (3) whether notice of cross-appeal was late or was not filed at all, and (4) the extent of any prejudice to the appellant caused by the absence of a cross-appeal. *See Lee*, 245 F.3d at 1107 & n.3. Careful application of these factors ensures that appellate courts will dispense with the cross-appeal requirement only under "exceptional circumstances." *Spann* v. *Colonial Vill., Inc.*, 899 F.2d 24, 33 (D.C. Cir. 1990) (R.B. Ginsburg, J.).

63, and flagged the issue in its appellate brief. See J.A. 85. Petitioner nevertheless opted not to file a reply brief, an omission that seriously undermines any claim of prejudice he might otherwise have. Faced with a challenge to the sentence's legality, the Eighth Circuit could not simply ignore the district court's egregious failure to impose the sentence required by statute and this Court's controlling decision in *Deal*, 508 U.S. at 137. And once the court of appeals was alerted to the error, it was obliged—once again by statute—to "remand the case for further sentencing proceedings with such instructions as [it] consider[ed] appropriate." 18 U.S.C. § 3742(f)(1). Enforcing a mandatory consecutive sentence that Congress required for the most dangerous offenders surely qualifies as "good reason" to dispense with the cross-appeal requirement.

The government attempts to shift the focus away from the nature of the error at issue, insisting that the cross-appeal requirement is at minimum a claim-processing rule analogous to those recognized in *Kontrick* and *Eberhart* and, as such, must be enforced when properly invoked. Gov't Br. 35-38. But even if the government's premise is correct, its desired conclusion does not follow.

The government acknowledges that "petitioner did not extensively develop" in his petition for rehearing the argument that the court of appeals acted improperly in the absence of a government cross-appeal. *Id.* at 38. That is an understatement. Petitioner styled his argument as follows: "The panel's decision to exercise discretion under Fed. R. Crim. P. 52(b) and remand for resentencing should be reheard en banc because any error by the district court in sentencing defendant to 442 months did not seriously affect fairness, integrity, or the public

reputation of judicial proceedings." J.A. 93. In other words, Petitioner did not assert that a cross-appeal was required, but rather contended that the panel had misapplied the fourth prong of the plain-error test articulated by this Court in *United States* v. *Olano*, 507 U.S. 725 (1993), and its progeny. To be sure, Petitioner mentioned the government's failure to appeal in the introductory statement and factual recitation of his rehearing petition. J.A. 90, 92. Those casual references did not, however, bring to the Eighth Circuit's attention either the supposedly controlling decisions of this Court or the general bar on expanding the judgment in favor of an appellee.[15]

The government recognizes that the perfunctory "assertion of a claim and citation of a case" is normally insufficient to preserve a claim of error. Gov't Br. 38. Indeed, the case law is replete with examples of appellate courts refusing to reach arguments raised in a single sentence, paragraph, or footnote.[16] In the face of this rule, the government proposes what amounts to a one-time-only exception ostensibly limited to cases where a court of appeals *sua sponte* expands the judgment in favor of a non-appealing appellee. See *id.* But the government's attempt to narrow its position lacks logical justification and would place enormous burdens on line-level federal prosecutors and appellate courts

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[15] To locate those decisions, the court of appeals would have had to trace back the sources relied on in *United States* v. *Rivera*, 411 F.3d 864 (7th Cir. 2005), which Petitioner did cite in his petition for rehearing. J.A. 95.

[16] *See, e.g.*, *Thomas* v. *Speedway SuperAmerica, LLC*, 506 F.3d 496, 500 & n.1 (6th Cir. 2007) (one paragraph); *United States* v. *Hall*, 370 F.3d 1204, 1208 n.4 (D.C. Cir. 2004) (one sentence); *United States* v. *Pirro*, 212 F.3d 86, 89 n.6 (2d Cir. 2000) (one footnote).

alike. The former would be forced to respond to every argument advanced by defense counsel on appeal, no matter how haphazardly raised. Unsure of their obligations, cautious courts of appeals would do the same, possibly prompting resolution of important issues without the full benefit of the very "'adversarial testing'" Petitioner extols. Pet'r Br. 29 n.16 (quoting *United States* v. *Cronic*, 466 U.S. 648, 656 (1984)). The better course is to avoid these potential pitfalls by holding that the Eighth Circuit properly dispensed with the cross-appeal requirement in order to correct the district court's contravention of a clear statutory command.

III. BECAUSE A CROSS-APPEAL IS NOT JURISDICTIONALLY REQUIRED, THE COURT OF APPEALS APPROPRIATELY VACATED THE UNLAWFUL SENTENCE UNDER BOTH ITS SUPERVISORY POWER AND THE PLAIN ERROR RULE.

As explained in Part I, section 3742 required the court of appeals to determine the legality of Petitioner's sentence once he filed an appeal under section 3742(a)(1), and to remand for resentencing that complied with subsection 924(c)(1)'s statutory minimum. But even if section 3742 did not so require, 28 U.S.C. § 2106 and Federal Rule of Criminal Procedure 52(b) both independently authorized the court of appeals to order that Petitioner be resentenced in accordance with law. Because the court of appeals' decision to do so was not jurisdictionally foreclosed by the absence of a cross-appeal, see Part II, the court of appeals properly exercised this authority.

A. The Court Of Appeals Properly Exercised Its Supervisory Powers Over The District Court In Ordering That A Lawful Sentence Be Entered.

This Court and the courts of appeals have long held a "supervisory power" over lower courts to fix unlawful sentences.[17] See *Yates* v. *United States*, 356 U.S. 363, 366 (1958); see also *Millich* v. *United States*, 282 F. 604, 606 (9th Cir. 1922) ("The appellate court, in affirming a conviction, may modify the punishment imposed by the trial court, by mitigating, reducing, or otherwise changing it, so far as it exceeds the limits prescribed by the statute." (internal quotation marks omitted)); *accord United States* v. *Wiley*, 278 F.2d 500, 503-04 (7th Cir. 1960); *Priori* v. *United States*, 6 F.2d 575, 576 (6th Cir. 1925) (per curiam).

The appellate courts' supervisory power to remedy unlawful sentences was ultimately codified in 28 U.S.C. § 2106. See *United States* v. *Clements*, 86 F.3d 599, 600-01 (6th Cir. 1996) ("Section 2106 . . . vests courts of appeals with supervisory power to vacate and remand an entire sentencing package despite the fact that it includes an unchallenged sentence."); *accord United States* v. *Ahuja*, 936 F.2d 85, 89-90 (2d

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[17] The federal appellate courts' power to correct an unlawful sentence on appeal is "well established" in this Court. *See, e.g.*, *Bozza* v. *United States*, 330 U.S. 160, 166-67 (1947) ("It is well established that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside on appeal . . . . The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner. In this case the court only set aside what it had no authority to do . . . ." (internal quotation marks omitted)); *Tinder* v. *United States*, 345 U.S. 565, 570 (1953).

Cir. 1991) (section 2106 gives court authority to remand improper sentence).

Section 2106 specifically gives authority to "[t]he Supreme Court or any other court of appellate jurisdiction" to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review." Courts have long recognized that the plain language of this statute gives courts the authority to modify unlawful sentences. See, *e.g.*, *Tinder* v. *United States*, 345 U.S. 565, 570 (1953) (Pursuant to 28 U.S.C. § 2106, "[t]he judgment of the Court of Appeals is reversed and the cause is remanded to the District Court to correct the [unlawful] sentence."); *accord Clements*, 86 F.3d at 600-01; *McClain* v. *United States*, 643 F.2d 911, 914 (2d Cir.) ("we may vacate appellant's entire sentence under the general supervisory powers granted us by 28 U.S.C. [§] 2106"), *cert. denied*, 452 U.S. 919 (1981).

The courts of appeals' supervisory power, as codified in section 2106, enables them to remand or modify a sentence once a notice of appeal is filed, even if the issue is not the subject of a cross-appeal. See, *e.g.*, *United States* v. *Milledge*, 109 F.3d 312, 315 (6th Cir. 1997) ("Without filing a cross-appeal, the government requested remand so the district judge could consider whether to enhance the defendant's sentence. We held that such a remand was permissible" under section 2106.); *United States* v. *Andersson*, 813 F.2d 1450, 1460-61 (9th Cir. 1987) ("[O]ur supervisory powers under 28 U.S.C. § 2106 allow us to remand for resentencing . . . [when] the entire judgment [is] in issue [because of] the inconclusiveness of the notice of appeal." (internal citations omitted)).

This Court, too, has recognized that its own supervisory power to correct unlawful sentences

extends to instances where parties have failed to properly appeal or raise an issue, as long as a notice of appeal has given the Court jurisdiction over the case. See, *e.g.*, *Reynolds*, 98 U.S. at 168-69. In *Reynolds*, "the sentence of the court below require[d] the imprisonment to be at hard labor, when the act of Congress under which the indictment was found provide[d] for punishment by imprisonment only." *Id.* Accordingly, this Court found that the sentencing court had exceeded its statutory power and for that reason "reverse[d] the judgment of the court below for the purpose of correcting the only error which appear[ed] in the record, to wit, in the form of the sentence." *Id.* at 169. The Court took this action even though the sentencing error had not been raised. *Id.* ("*This was not assigned for error on the former hearing*, and we might on that account decline to consider it now; but as the irregularity is one which appears on the face of the record, we vacate our former judgment . . . ." (emphasis added)); see also *Priori*, 6 F.2d at 576 (court of appeals "observe[d] that the sentence . . . was unauthorized by law [and] amended [it] accordingly," even though appellant did not assign error as to the sentence).

Once the court of appeals obtained jurisdiction over Petitioner's sentencing appeal, the court was vested with the discretionary power to correct Petitioner's unlawful sentence. That this was an appropriate exercise of appellate discretion is further recommended by the obviousness of the error in this case. See *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976) ("Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, or where 'injustice might otherwise result.'"). Consequently, the court of

appeals' considered judgment should not be overturned.

B. Rule 52(b) Authorizes Correction Of The District Court's Plainly Erroneous Failure To Impose A Lawful Sentence.

In addition to its general supervisory power over the district court, the court of appeals was also authorized to order Petitioner resentenced under Federal Rule of Criminal Procedure 52(b). Rule 52(b) permits appellate courts, in their discretion, to correct errors that are plain, that affect substantial rights, and that "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Cotton*, 535 U.S. 625, 626 (2002). Petitioner and the government do not dispute the fact that the district court committed legal error in imposing a sentence 220 months shorter than the sentence mandated by Congress in 18 U.S.C. § 924(c)(1). Nor do they dispute the fact that the district court's legal error was plain under *Deal*, 508 U.S. at 137. Instead, Petitioner proposes that this Court redefine "substantial rights" so as to exclude the rights of the public in the criminal justice process. Moreover, Petitioner, the government and NACDL, each in their varying ways, would have this Court so narrowly cabin appellate discretion as to transform it into a one-way ratchet that allows unlawfully lenient sentences to stand.

1. The District Court's Unlawful Sentence Affected Substantial Rights.

As the government has explained, see Gov't Br. 45-46 (collecting cases), it is well settled that Rule 52(b) authorizes courts to correct plain errors that result in unduly lenient sentences. In so ruling, the courts of appeals have consistently rejected the view (espoused

by Petitioner here) that only criminal defendants have substantial rights that may be protected through plain error review. See Pet'r Br. 32-33.

First, Rule 52(b) on its face draws no distinction between plain errors that affect the substantial rights of criminal defendants and those errors that affect the substantial rights of the government: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b); see, *e.g.*, *United States* v. *Dickerson*, 381 F.3d 251, 257 (3d Cir. 2004); *United States* v. *Gordon*, 291 F.3d 181, 194 (2d Cir. 2002); *United States* v. *Barajas-Nunez*, 91 F.3d 826, 833 (6th Cir. 1996).[18]

Moreover, there is no indication in the Federal Rules of Criminal Procedure that the term "substantial rights" is limited to only the rights of criminal defendants. Indeed, contrary to Petitioner's suggestion, see Pet'r Br. 32 n.19, the use of the term "substantial rights" in Rule 7(e) supports the view

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[18] Because the language of Rule 52(b) is clear, it is unnecessary for the Court to consider the history of the plain error doctrine prior to the adoption of Rule 52(b). But even if the Court were to look to pre-Rule practices in defining the scope of Rule 52(b), *see* Pet'r Br. 33-34, the fact that the plain error doctrine developed at a time when only criminal convictions (and not criminal sentences) could be appealed arguably suggests that such restrictions on appellate review should not apply to modern-day sentencing appeals. Given the high costs associated with retrying a defendant, the ability of courts to correct forfeited errors related to a defendant's conviction was understandably restricted. However, the costs of resentencing a defendant are substantially less than holding an entirely new trial, and thus there is a lesser need to restrict the ability of courts to correct sentencing errors. *See Gordon*, 291 F.3d at 199 & n.2 (Newman, J., concurring).

that "substantial rights" encompasses both the rights of criminal defendants and the government. If "substantial rights" by definition were limited only to the rights of criminal defendants, then the phrase "of the defendant" would be mere surplusage. See Fed. R. Crim. P. 7(e) ("Unless an additional or different offense is charged or a substantial right *of the defendant* is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.") (emphasis added).

Defining the term "substantial rights" so as to exclude the rights of the government would also betray the fact that the public, too, has important rights in the criminal justice process. See *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.) ("[J]ustice, though due to the accused, is due to the accuser also."), *overruled in part on other grounds by Malloy* v. *Hogan*, 378 U.S. 1 (1964). Along with concerns for adequate and consistent criminal sentences, mandatory minimum sentences for offenses such as carrying a firearm during a crime of violence reflect Congress's considered judgment that such criminal acts pose an especially grave threat to public safety. See *United States* v. *T.M.*, 413 F.3d 420, 426 (4th Cir. 2005) ("[T]he legislative history of § 924(c) demonstrates a keen and continuing attentiveness by Congress to combating the serious national problem caused by the use of firearms in furtherance of crimes of violence."). Thus, the public's rights are directly implicated when an illegally low sentence is imposed, and Rule 52(b) allows federal appeals courts to reach and correct unlawful sentences.

2. Failure To Impose A Statutorily-Mandated Sentence Seriously Affects The Fairness, Integrity And Public Reputation Of Judicial Proceedings.

The Eighth Circuit appropriately determined that the error at issue "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (alteration in original).

As 18 U.S.C. § 3553(a) makes clear, Congress has determined that the fairness, integrity and reputation of judicial proceedings is called into question when similarly situated defendants receive disparate sentences for the same illegal conduct.[19] See 18 U.S.C. § 3553(a) ("The court, in determining the particular sentence to be imposed shall consider— . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . . ."); *Barajas-Nunez*, 91 F.3d at 833. When a sentencing court fails to impose a sentence in accordance with express statutory mandates regarding the required sentence, the disparity and unfairness are fully apparent. Moreover, because the costs associated with resentencing a defendant are comparatively less than holding a new trial, allowing a plain sentencing error to go uncorrected is even more unfair. See *Gordon*, 291 F.3d at 194-95.

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[19] Petitioner's suggestion that courts have no discretion to correct illegally low sentences is incorrect. As the government correctly notes in its brief, *see* Gov't Br. 46-47, the Fifth and Eighth Circuit decisions relied upon by Petitioner were based on a narrow formulation of the plain error doctrine rejected in *Olano*, and the validity of these pre-*Olano* decisions is now in doubt. *See, e.g.*, *United States* v. *Barnett*, 410 F.3d 1048, 1051 (8th Cir. 2005); *Dickerson*, 381 F.3d at 257 n.6; *United States* v. *Campos*, 362 F.3d 1013, 1014 (8th Cir. 2004).

A lack of sentencing uniformity is particularly problematic in the mandatory minimum context. See *United States* v. *Clark*, 274 F.3d 1325, 1329 (11th Cir. 2001) (per curiam) ("We can discern no principled basis for restricting access to 'plain error' review of an illegal sentence which contravenes either a statutory minimum or a statutory maximum." (citation omitted)). Mandatory minimum sentences are designed to deter dangerous criminal conduct and prevent repeat offenses by guaranteeing that defendants will receive at least a minimum sentence for certain crimes. See U.S. Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 13 (Aug. 1991); *United States* v. *Angelos*, 433 F.3d 738, 751 (10th Cir.) ("[T]he lengthy sentences mandated by § 924(c) were intended by Congress . . . to deter criminals from possessing firearms during the course of certain felonies." (citation omitted)), *cert. denied*, 127 S. Ct. 723 (2006); see also *Harmelin* v. *Michigan*, 501 U.S. 957, 1008 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (Michigan mandatory-minimum sentencing "scheme provides clear notice of the severe consequences that attach to possession of drugs in wholesale amounts, thereby giving force to one of the first purposes of criminal law-deterrence"). These deterrent effects will be undermined, however, if courts do not ensure consistent application of mandatory minimum statutes through plain error review. Indeed, if the Court were to adopt Petitioner's and NACDL's view that only unduly harsh sentences could be corrected, the result would be a one-way ratchet that would result in sentences below the minimum mandated by statute. See Pet'r Br. 32; NACDL Br. 19.

Petitioner also argues that the court of appeals should have overlooked the district court's plain legal error because Petitioner had already received a "very lengthy sentence of 442 months." Pet'r Br. 34. The fact that Petitioner received such a sentence, however, merely reflects the severity of Petitioner's crimes as a member of a major drug conspiracy. In determining whether a sentencing error should be corrected, the relevant metric is not the length of the initial sentence but rather the disparity between the length of the sentence mandated by statute and the length of the sentence actually imposed. Here, Petitioner received a sentence that was 220 months (or 33%) shorter than the minimum sentence required by law. Such an egregious error can hardly be deemed de minimis under any formulation.

Furthermore, remand of Petitioner's illegal sentence cannot be deemed a violation of due process. As explained *supra* at 36, Petitioner had ample notice that the lawfulness of his sentence was in question. The issue of subsection 924(c)(1)'s mandatory minimum sentence was squarely addressed during Petitioner's sentencing hearing. See J.A. 59 ("I realize that the Probation Office calculated a 25-year mandatory minimum on Count 10, and I'm asking the Court not to impose that."). In choosing to appeal the reasonableness of his sentence, Petitioner himself placed the lawfulness of his sentence at issue. Thus, the Eighth Circuit's remand of Petitioner's sentence should have come as no shock to him.[20]

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[20] Petitioner contends that the Eighth Circuit's correction of the district court's plain error was unfair because the court did not have the benefit of briefing by the parties. Pet'r Br. 29 n.16. However, the sentencing error was explicitly discussed in the government's brief to the Eighth Circuit. J.A. 85 ("Although 18 U.S.C. § 924(c) required a 5-year sentence on Count 4

Nor does the district court's resentencing of Petitioner run afoul of double jeopardy concerns. See *United States* v. *Hawthorne*, 806 F.2d 493, 501 (3d Cir. 1986) ("[I]t is well settled that correction of an illegal sentence by resentencing does not implicate double jeopardy rights." (internal quotation marks omitted)). In *United States* v. *DiFrancesco*, 449 U.S. 117, 132 (1980), this Court ruled that appellate review of a defendant's sentence does not constitute a double jeopardy violation simply because it "might deprive respondent of the benefit of a more lenient sentence." See *id.* ("[O]ur task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support such an equation."); *Bozza* v. *United States*, 330 U.S. 160, 166-67 (1947).

Here, the district court at resentencing imposed the minimum sentence permitted by statute, so there can be no suggestion that Petitioner's increased sentence constitutes double jeopardy or reflects vindictiveness by the courts for taking an appeal. See *United States* v. *Guevremont*, 829 F.2d 423, 427-28 & n.7 (3d Cir. 1987) ("[W]here the increase of sentence results from the correction of an illegal sentence to make it conform to the statutory minimum or to the original

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(consecutive to the 262 month guideline sentence) and a 25-year sentence, consecutive to the previously imposed sentences, the court gave the defendant 5 years consecutive for Count 4 and 10 years consecutive for Count 10, resulting in a total sentence of 442 months rather than 662 months."). Petitioner could have addressed this issue if he had filed a reply brief, but he elected not to do so.

intent of the sentencing judge, the argument that the double jeopardy clause precludes an increase of sentence has been uniformly rejected."); *United States ex rel. Ferrari* v. *Henderson*, 474 F.2d 510, 512-13 (2d Cir. 1973); *United States* v. *Bishop*, 487 F.2d 631, 633 (1st Cir. 1973).

3. Rule 52(b) Permits Courts To Correct Plain Errors *Sua Sponte*.

Finally, the Eighth Circuit's remand of Petitioner's illegal sentence was permitted under Rule 52(b) because courts have the authority to notice plain errors *sua sponte*.[21]

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[21] Contrary to NACDL's suggestion, *see* NACDL Br. 10-12, the district court's sentencing error has not been waived by the government and is still remediable under Rule 52(b). As the Court explained in *Olano*, "waiver" in the context of plain error review means that there is no legal error to be corrected, *i.e.*, when a party consents to a particular course of proceedings, the party's rights are not violated, and there is no legal error. *See* 507 U.S. at 732-33 ("Deviation from a legal rule is 'error' unless the rule has been waived."). In this case, legal error did occur because the district court imposed a plainly illegal sentence over the explicit objection of the government. *See* J.A. 49-50 ("The law is clear on this issue, and the appropriate sentence is . . . twenty-five years, consecutive, for Count 10."); *id.* 62-63 ("In order to preserve any potential appeal, I would simply object to that finding."). Thus, the only question under Rule 52(b) is whether the district court's error affected substantial rights and seriously affected the fairness, integrity or public reputation of judicial proceedings.

Moreover, because Rule 52(b) on its face authorizes courts to correct plain errors *sua sponte*, it is of no moment that the government did not request on appeal that Petitioner's unlawful sentence be vacated. And even if a party's knowing decision not to appeal a legal error could trump a court's power to correct plain legal errors (including errors preserved in the district court), it is unclear whether the government here intentionally relinquished the right to cross-appeal or whether it

This Court has previously made clear that, although parties ordinarily bring plain errors to the attention of an appellate court, there is no requirement that courts turn a blind eye to plain errors not raised by the parties. See *Silber* v. *United States*, 370 U.S. 717, 717-18 (1962) (per curiam) ("While ordinarily we do not take note of errors not called to the attention of the Court of Appeals nor properly raised here, that rule is not without exception. The Court has the power to notice a plain error though it is not assigned or specified." (internal quotation marks omitted)); *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936).

Likewise, Rule 52(b) expressly provides that a court may consider a plain error "even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b); see 3B Wright et al., *supra* § 856, at 513 (3d ed. 2004) ("Ordinarily Rule 52(b) is invoked by counsel who, in preparing an appeal, discover what they consider to be an error to which no objection was taken below. The rule is not so limited, however, and the appellate court may take notice of an error on its own motion though it is never put forward by counsel."). Rule 52(b) is thus in accord with this Court's own plain error rule. See Sup. Ct. R. 24.1(a) ("At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.").

In arguing that plain errors affecting the public's substantial rights should be corrected only if a cross-appeal is filed, the government contends that "the

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inadvertently failed to file a timely protective notice of cross-appeal. *See Olano*, 507 U.S. at 733 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)).

government is fully capable of determining whether to seek to vindicate its rights." Gov't Br. 47. Such an argument, however, overlooks the fact that Rule 52(b) exists precisely because even plain errors may sometimes escape the attention of the parties or go unnoticed until after the time to file a notice of cross-appeal has elapsed. If the Court were to adopt the government's modification of Rule 52(b), courts would be wholly unable to correct plain errors (no matter how egregious) that are first discovered by the government during briefing or in preparation for oral argument, or that are overlooked by the government altogether, unless the government coincidentally had filed a cross-appeal on other grounds. Adopting the government's construction of Rule 52(b) would also suggest that this Court's discretion to correct plain errors under Supreme Court Rule 24.1 similarly should be restrained.

Preserving the power of courts to correct plain errors *sua sponte* is especially important in cases (such as this one) in which the government has confessed error. Because the ordinary assurances provided by the adversarial process do not apply, the authority of courts to notice and correct plain errors takes on heightened importance. See *Young*, 315 U.S. at 258-59 ("[O]ur judicial obligations compel us to examine independently the errors confessed. . . . [T]he proper administration of the criminal law cannot be left merely to the stipulation of parties." (citation omitted)). Thus, the Eighth Circuit appropriately exercised its authority to correct a plainly illegal sentence that contravened the considered judgment of Congress and this Court's binding precedent.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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ADDENDA

ADDENDUM A

18 U.S.C. § 3742. Review of a sentence

(a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline

range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such

instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Sentencing upon remand.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) Application to a sentence by a magistrate judge.—An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) Guideline not expressed as a range.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) Definitions.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

ADDENDUM B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPELLATE CASE NO. 06-1365

UNITED STATES OF AMERICA,

Appellee,

vs.

MICHAEL JASON GREENLAW,

Appellant.

BRIEF OF APPELLANT, Michael Jason Greenlaw

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IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN DETERMINING APPELLANT'S SENTENCE, AND THE IMPOSED SENTENCE OF 442 MONTHS WAS EXCESSIVE IN LIGHT OF THE FACTORS ENUMERATED IN 18 U.S.C. SECTION 3553(A) AND THUS UNREASONABLE.

A. *Standard of Review*

This Court examines *de novo* whether the district court correctly interpreted and applied the guidelines. *United States v. Guy*, 340 F.3d 655, 658 (8th Cir.2003). The Court reviews findings of fact for clear error. *See United States v. Killgo*, 397 F.3d 628, 631 (8th Cir. 2005). Finally, the Court reviews a district court's decision to depart from the appropriate guidelines range for abuse of discretion. *See United States v. Pizano*, 403 F.3d 991 (8th Cir. 2005). If the sentence was imposed as the result of an incorrect application of the guidelines, this Court will remand for resentencing as required by 18 U.S.C. § 3742(f)(1) without reaching the reasonableness of the resulting sentence in light of § 3553(a). In *United States v. Booker*, 125 S.Ct. 738, 769, the Court indicated that the standard of review for a sentence is for reasonableness.

B. *The District Court Abused Its Discretion and Also Erred By Failing to Employ a Criminal History Category of II Instead of a Criminal History Category of III.*

The federal sentencing guidelines provide for a downward departure of the criminal history score in certain situations. *See United States Sentencing Guidelines Section 4A1.3 (b) (1).* Specifically, "[I]f

reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted." *USSG section 4A1.3 (b) (1).*

In determining whether a downward departure is justified under 4A1.3, the court must consider the historical facts of a defendant's career, including his age when he committed the offenses, the proximity in time of earlier offenses to the current one, and the state courts' handling of sentencing as well as the length of time the defendant actually served. *See United States v. Senior*, 935 F.2d 149, 151 (8th Cir. 1991).

In the instant case, the presentence investigation report (hereinafter "PSR") determined that Mr. Greenlaw had a total of five criminal history points placing him in a Category III for criminal history. However, one of those convictions was for an offense committed when Mr. Greenlaw was 18 years old; over 10 years prior to his age at the time of the instant sentencing. Further, although the instant allegations involved conduct ranging from 1996 to 2003, Mr. Greenlaw has been incarcerated, as the result of a state conviction and pretrial federal detention, since July 12, 2000. Mr. Greenlaw was sentenced to 60 months in a Minnesota Correctional Facility, and served the majority of that time in state prison before being brought to face federal charges.

Given the above factors, the district court should have granted a downward departure of Mr. Greenlaw's criminal history to category II pursuant to USSG section 4A1.3. By failing to do so, the district court abused its discretion.

C. *The District Court Abused Its Discretion By Imposing a Sentence that is Unreasonable in light of the Considerations in 18 U.S.C. Section 3553(a).*

The Supreme Court ruled that its Sixth Amendment holding *in Blakely v. Washington,* 124 S.Ct. 2531 (2004) and *Apprendi v. New Jersey,* 530 U.S. 466 (2000) applies to the Federal Sentencing Guidelines. *United States v. Booker,* 125 S.Ct. at 756. Under *Booker,* sentencing courts must treat the guidelines as just one of a number of sentencing factors set forth in 18 U.S.C. 3553(a). The primary directive in Section 3553(a) is for sentencing courts to impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2. Section 3553(a) (2) provides, in pertinent part, that factors to be considered include:

(1) the nature and circumstances of the offense
(2) the need for the sentence imposed -
  (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  (B) to afford adequate deterrence to criminal conduct;
  (C) to protect the public from further crimes of the defendant; and
  (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. Section 3553(a).

In the instant case, Appellant requested the District Court to impose a mandatory minimum sentence of 15 years, or rather the shortest sentence

possible upon consideration of Section 3553 (a). *See Position of Defendant With Respect to Sentencing Factors* at 8-10. The Court declined to honor this request by the defense and sentenced Appellant Greenlaw to a total of 442 months.

Part of this sentence included a consecutive sentence or 120 months for Count 10 of the indictment; the allegations from June 15, 1999 for which Appellant was convicted and incarcerated in state court prior to the federal indictment. *See Transcript of Sentencing Hearing dated January 19, 2006* at 9, 21. This decision was unreasonable not only because Mr. Greenlaw had already served a sentence for the same conduct alleged in Count 10, but also because the factors in Section 3553(a) support a lesser sentence.

Specifically, a 15 year sentence is sufficient to satisfy the purposes of sentencing. A 15 year sentence would reflect the seriousness of the offense of conviction and provide sufficient deterrence for future misconduct. The minimum 15 year sentence also is sufficient and not greater than is needed to provide Mr. Greenlaw with needed educational and vocational opportunities while incarcerated. 15 years is more than reasonable given Mr. Greenlaw's age and historical characteristics. Further, the PSR recommended that Mr. Greenlaw should be considered an average participant.

Given all of these factors, the Court abused its discretion by sentencing Mr. Greenlaw to 442 months. A lesser sentence as discussed above would comply with the statutory mandate of 18 USC Section 3553(a) because it is sufficient to comply with the purposes of that statutory provision.

CONCLUSION

For the reasons advanced in the arguments above, Appellant Michael Jason Greenlaw requests that this Court reverse his conviction and grant him a new trial, or alternatively, should the conviction be affirmed, remand the case for resentencing. Further, as this matter is a consolidated appeal following a joint trial, Appellant Greenlaw requests leave to adopt any arguments of his codefendant Laquan Carter that are raised on appeal and were preserved on the record below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-330

IN THE
Supreme Court of the United States

MICHAEL J. GREENLAW,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a federal court of appeals may increase a criminal defendant's sentence *sua sponte* and in the absence of a cross-appeal by the Government.

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The National Association of Criminal Defense Lawyers ("NACDL") files this brief as amicus curiae in support of petitioner with the written consent of the parties.[1]

INTEREST OF *AMICUS CURIAE*

NACDL is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs on a broad range of subjects in this Court and other courts, including briefs in previous cases involving sentencing issues. *See, e.g.*, *Burgess v. United States*, No. 06-11429 (to be argued March 24, 2008); *Begay v. United States*, No. 06-11543 (argued Jan. 15, 2008).

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[1] Letters of consent have been filed with the Clerk. No party or counsel for a party to this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Petitioner was convicted of drug and firearm-related crimes, and the district court imposed a sentence of 442 months' imprisonment. Petr. Br. 2-3. The Government had urged a sentence 15 years longer under 18 U.S.C. § 924(c)(1), but the district court expressly rejected the Government's argument and imposed the lesser sentence. *Id.* at 3. The Government not only declined to appeal the sentence, but answered petitioner's own challenge to the sentence on appeal by arguing that the district court's § 924(c) calculation was "not unreasonable." JA86. Despite the lack of any appeal by the Government, the Eighth Circuit *sua sponte* increased petitioner's sentence by 15 years, adopting the very argument rejected by the district court and left unappealed by the Government. Pet. App. 9a-10a.

The Eighth Circuit's decision to increase petitioner's sentence *sua sponte* was wrong and should be reversed. Petitioner describes as "inveterate and certain," and possibly jurisdictional, the rule that an appellate court cannot alter a judgment to benefit a non-appealing party. NACDL does not address the status or nature of the rule generally, but instead submits that the question in this case is best answered by principles – including separation of powers considerations and due process concerns – that apply uniquely to an appellate court's *increase* of a sentence unchallenged by the Government. As elaborated below, this Court can and should correct the Eighth Circuit's error here without casting doubt on the authority of an appellate court to decrease a sentence that exceeds the period authorized by Con-

gress when a defendant fails to challenge that sentence on appeal.

ARGUMENT

I. SEPARATION OF POWERS PRINCIPLES PROHIBIT APPELLATE COURTS FROM INCREASING CRIMINAL SENTENCES *SUA SPONTE*

The authority of an appellate court to increase a criminal sentence *sua sponte* is controlled – and precluded – by policy judgments exercised by both Congress and the Executive Branch. Congress has always controlled the extent to which the prosecution can appeal criminal cases, if at all, and only recently authorized general sentencing appeals, subject to the Solicitor General's specific determination that an appeal is warranted. When a federal appellate court decides on its own that a criminal sentence should be increased, it is overriding the Executive Branch's judgment that the sentence should not be challenged despite an arguable error, as well as the Legislative Branch's judgment that decisions about sentencing appeals should be left to the discretion of senior Executive Branch judicial officers.

A. Congress Has Historically Limited Criminal Appeals By Government

Congress has long controlled – and strictly limited – the Government's right to appeal any issue in any criminal case. *Carroll v. United States*, 354 U.S. 394, 400-01 (1957). Congress did not authorize the Government to appeal criminal cases at all until 1907. *Id.* at 401 (citing Act of Mar. 2, 1907, ch. 2564, 34 Stat. 1246). The history of congressional restriction shows that "appeals by the Government in

criminal cases are something unusual, exceptional, not favored." *Id.* at 400.

The history also shows that the judgment about what matters generally may be challenged on appeal in criminal cases is one reserved for Congress in the first instance. It is "the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." *Id.* at 408. Accordingly, regulation of "discretionary limitation of the right to take the appeal" can come "only through legislative resolution." *Id.* at 408. In addition to respecting Congress's policy and constitutional prerogatives, the principle of narrowly construing government criminal appeal rights reflects "a concern that individuals should be free from the harassment and vexation of unbounded litigation by the sovereign," and helps safeguard "the constitutional ban against double jeopardy." *Arizona v. Manypenny*, 451 U.S. 232, 246 (1981). Accordingly, this Court has long adhered to a "presumption that the prosecution lacks appellate authority absent express legislative authorization to the contrary." *Id.*

In the Comprehensive Crime Control Act of 1984 ("CCCA"), Pub. L. No. 98-473, § 213(a), 98 Stat. 1837 (1985), Congress for the first time gave the Government general authority to pursue sentencing appeals, but it imposed an important condition: "the Attorney General or the Solicitor General" must "personally approve[] the filing of the notice of appeal." *Id.*, 98 Stat. at 2012 (codified as amended at

18 U.S.C. § 3742(b)).[2] Congress thus determined that, absent such personal authorization, sentencing errors – no matter how obvious or egregious – simply would not be brought to the attention of the appellate courts. The law *presupposed*, in other words, that certain errors would remain uncorrected. As the next section shows, that determination reflects an important policy judgment about prosecutorial discretion over sentencing appeals.

B. The Requirement Of Solicitor General Approval Of Sentencing Appeals Reflects An Important Policy Judgment About Discretion In Enforcement Of Sentencing Statutes

The CCCA's requirement that the Solicitor General personally approve every sentencing appeal reflects Congress's recognition that a sentencing appeal, just like a charging decision, may constitute a significant policy determination implicating more than just the facts and circumstances of the individual case. As a general matter, Congress expected that the Solicitor General would enforce the basic policy of minimizing burdensome appellate litigation, and therefore approve sentencing appeals selectively. *See* S. Rep. No. 98-225, at 154 (1983), *re-*

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[2] The Attorney General has delegated to the Solicitor General the authority to authorize appeals. *See* 28 C.F.R. § 0.20(b) (2007). The statute was amended in 1990 to allow a deputy solicitor general designated by the Solicitor General to approve an appeal, and to require such approval after the filing of a notice of appeal for the Government to "further prosecute such appeal." Crime Control Act of 1990, Pub. L. No. 101-647, § 3501, 104 Stat. 4789, 4921.

printed in 1984 U.S.C.C.A.N. 3182, 3337 (Solicitor General approval would "assure that such appeals are not routinely filed for every sentence below the guidelines"). More significantly, the Solicitor General approval requirement ensures that each sentencing appeal decision is made with an eye to broader law enforcement objectives. As then-Judge Kennedy explained with respect to criminal appeals generally, "[i]n reaching its decision whether or not to appeal, the government must be concerned . . . with the consistency of its positions and the future impact of the case." *United States v. Avendano-Camacho*, 786 F.2d 1392, 1394 (9th Cir. 1986). The same principle applies equally to sentencing appeals: the Solicitor General selects which sentences to appeal based not only on the merits of a case, but also in accordance with statutory and executive law enforcement policies implicated in sentencing. *See United States v. Gonzalez*, 970 F.2d 1095, 1102 (2d Cir. 1992) ("[C]entralized decisionmakers screen proposed Government appeals so that the appellate courts' attention will be focused on those sentences for which review is deemed crucial to the proper functioning of the sentencing guidelines."); *United States v. Long*, 911 F.2d 1482, 1484 (11th Cir. 1990) ("[T]he Justice Department's present procedures ensure that proposed [sentencing] appeals will be reviewed for consistency with Congress's policy directives.").

This Court has long recognized the important role played by the Solicitor General in selecting cases to appeal based in part on Executive Branch policy objectives. *See, e.g., United States v. Mendoza*, 464 U.S. 154, 161 (1984) ("It would be idle to pretend

that the conduct of government litigation in all its myriad features . . . is a wholly mechanical procedure which involves no policy choices whatever."); *Andres v. United States*, 333 U.S. 740, 764 (1948) (Frankfurter, J., concurring) (approving the Solicitor General's "comprehensive view in determining when certiorari should be sought" and when, for "reasons unrelated to the merits of a decision, review ought not be sought"). Just as the centralization of the decision whether to seek certiorari endows the Solicitor General with the ability to coordinate the Government's litigating position and to speak for the Government "with one voice," *United States v. Providence Journal Co.*, 485 U.S. 693, 706 (1988), the personal involvement of the Solicitor General in pursuing sentencing appeals "focus[es] the government's attention on the most important sentencing issues, prevent[s] the government from taking inconsistent positions, and limit[s] the possible proliferation of appeals," *United States v. Ruiz-Alonso*, 397 F.3d 815, 819 (9th Cir. 2005).

Because many factors unrelated to the merits of a case may inform which sentences the Government chooses to appeal, Congress necessarily understood that requiring the personal authorization of the Solicitor General would leave some improperly lenient sentences in place. *Cf. Providence Journal*, 485 U.S. at 702 n.7 (explaining that, with respect to the decision whether to seek certiorari, it is necessary to "rel[y] on the Solicitor General to exercise . . . independent judgment and to decline to authorize petitions for review in this Court in the majority of the cases the Government has lost"). Congress's requirement that the Solicitor General screen sentenc-

ing appeals reflects a judgment that some degree of error must be tolerated in order to advance a coordinated appeals process.

In the foregoing respects, the decision whether to appeal a criminal sentence is not materially different from the decision whether to bring a criminal case *ab initio* – a decision that has been deemed the subject of exclusive Executive Branch discretion. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996). "In the ordinary case '. . . the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion.'" *Id.* at 464 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)); *see also United States v. Nixon*, 418 U.S. 683, 694-95 (1974) ("Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government."). As Judge Kozinski has explained: "Second-guessing the exercise of prosecutorial discretion reflects a fundamental disregard for the principle of separation of powers. An opinion of this court is not a platform from which individual judges should express their personal views about the wisdom of . . . enforcement efforts." *United States v. Mussari*, 168 F.3d 1141, 1142 (9th Cir. 1999) (Kozinski, J., dissenting from denial of rehearing en banc); *see also United States v. Redondo-Lemos*, 955 F.2d 1296, 1299-1300 (9th Cir. 1992) ("Prosecutorial charging and plea bargaining decisions are particularly ill-suited for broad judicial oversight. . . . Such judicial entanglement in the core decisions of another branch of government – especially as to those bearing directly and substantially on matters liti-

gated in federal court – is inconsistent with the division of responsibilities assigned to each branch by the Constitution.").

This principle applies equally to prosecutorial decisions affecting sentencing. *See, e.g., In re Vasquez-Ramirez*, 443 F.3d 692 (9th Cir. 2006). In *Vasquez-Ramirez*, the district court refused to accept a defendant's guilty plea on the ground that the plea limited the court's ability to impose a sentence that was adequate in light of the defendant's criminal history. *Id.* at 697. The Ninth Circuit issued a writ of *mandamus* to force the district court to accept the plea. *Id.* at 701. The court of appeals applied the rule that, while a district court generally has sentencing discretion with respect to a charge brought before it, the court's discretion is "cabined . . . by the prosecutor's decision regarding which charges to pursue," a "strictly executive" decision in which a court "has no constitutional role." *Id.* at 698.

The same rule must apply here. By express statutory design, a sentencing appeal decision is an executive policy judgment akin to a charging decision. Accordingly, an appellate court has no more discretion to increase a sentence the Government has chosen not to appeal than a district court has to impose a sentence for a crime the Government has chosen not to charge. Either court's discretion is limited solely to the matters the Government has elected to put before it, in the exercise of its congressionally mandated law enforcement authority. *Cf. Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but es-

sentially as arbiters of legal questions presented and argued by the parties before them."). To increase a sentence the Government has chosen not to challenge on appeal is to interfere with an exercise of prosecutorial discretion, which is beyond the power of any Article III court.

C. The Government's Decision To Forgo A Challenge To A Sentence On Appeal Is An Affirmative Act Of Discretion Distinct From Forfeiture

Federal Rule of Criminal Procedure 52(b) – which allows appellate courts to afford relief for "plain error[s]" affecting "substantial rights" – does not strictly govern this case because that rule, by its terms, applies when a party brings to the appellate court's attention an error that was *not* challenged in the district court. Here the situation is the opposite: the Government did raise its sentencing argument below, but affirmatively elected not to challenge the district court's sentencing error on appeal. The question here is not whether the trial court committed "plain error" under Rule 52(b) – it is whether the appellate court has authority to correct a properly-noticed error below that the Government chose not to challenge on appeal. Rule 52(b) does not answer that question, but certain principles embodied in the Rule – specifically, the distinction between "waiver" and "forfeiture" – do provide helpful guidance.

Waiver and forfeiture under Rule 52(b) are different acts with different consequences. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v.*

Olano, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Errors in criminal cases that are merely forfeited are reviewable for plain error pursuant to Rule 52(b), but errors that are affirmatively waived are *not* reviewable under Rule 52(b). *See id.* at 733-34; *accord United States v. Walker*, 237 F.3d 845, 851 (7th Cir. 2001) ("Waiver precludes appellate review."). In other words, a court of appeals has discretion to correct errors involving "an accidental or negligent omission (or an apparently inadvertent failure to assert a right in a timely fashion)," but not those errors that are "manifestation[s] of an intentional choice not to assert the right." *United States v. Cooper*, 243 F.3d 411, 416 (7th Cir. 2001).

Waiver can be inferred from the circumstances, so long as they show that the party knowingly relinquished a legal right. *See, e.g., United States v. Magouirk*, 468 F.3d 943, 947 (6th Cir. 2006); *see also United States v. Avants*, 278 F.3d 510, 519 (5th Cir. 2002) (looking to "evidence of the government's intent" to determine whether the government waived an issue). Courts of appeals have often refused to review sentencing determinations for plain error when a party declines to press an argument for what appear to be tactical reasons, *see, e.g., United States v. Quinones*, 511 F.3d 289, 321 (2d Cir. 2007) ("such inaction constitutes a true waiver which will negate even plain error review" (quotation omitted)), or when a party withdraws an objection knowing that the district court is poised to make an error, *see, e.g., United States v. Masters*, 118 F.3d 1524, 1526 (11th Cir. 1997) ("The plain error doctrine is inapplicable in [this] situation.").

A decision by the Government not to appeal a criminal sentence, despite its preservation of an objection below, is clearly a waiver of its right to appeal, not a forfeiture. Given the elaborate process Congress imposed on Government sentencing appeals, there can be nothing "accidental or negligent" (*Cooper*, 243 F.3d at 416) when the Government fails to appeal a sentence that is improperly lenient. Indeed, as noted, Congress necessarily *assumed* some such sentences would go unchallenged. To deem those instances forfeitures and thereby allow discretionary plain-error review would negate Congress's decision to entrust the executive – not the judiciary – with the discretion to determine which improperly low sentences should stand uncorrected.

Because the Government's failure to appeal an erroneous sentence is necessarily a waiver of its right to appeal, rather than a forfeiture, the principles applied under Rule 52(b) demonstrate that the asserted error is unreviewable on appeal.

II. DUE PROCESS CONCERNS ALSO WEIGH STRONGLY AGAINST INCREASING SENTENCES *SUA SPONTE*

An appellate court's power to increase a sentence *sua sponte* also must be constrained by concerns for the due process rights of the defendant whose sentence is suddenly, and surprisingly, increased. Defendants of course have substantial due process interests in the fairness of the procedures used to determine the length of time for which their liberty is deprived. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 469, 490 (2000) (holding that the Due Process Clause of the Fourteenth Amendment requires jury

determinations of certain facts that would increase a defendant's sentence); *Alabama v. Smith*, 490 U.S. 794, 798-99 (1989) (stating that the Due Process Clause prohibits heightened sentences that result from judicial vindictiveness upon resentencing). Allowing appellate courts to increase sentences *sua sponte* adversely affects those interests in several ways.

First, a *sua sponte* sentence increase denies the defendant his or her right to fair notice. Notice of the possibility of a sentence increase is of special import to criminal defendants, as evidenced by the various notice-related rights provided expressly in the Federal Rules of Criminal Procedure. *See, e.g.*, Fed. R. Crim. P. 32(f) (opportunity for defendant to object to presentence report); *id.* R. 32(h) (court must give notice of possible departure from the Federal Sentencing Guidelines on grounds not previously identified); *id.* R. 43(a)(3) (requiring the defendant's presence at sentencing). And a central purpose of the cross-appeal requirement (and the basic notice-of-appeal requirement) is to provide the adverse party notice that his or her rights are not secure, but instead will be challenged on appeal. *See Smith v. Barry*, 502 U.S. 244, 248 (1992) ("The purpose of [the notice of appeal] requirement is to ensure that the filing provides sufficient notice to other parties and the courts."); *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943) ("The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's de-

mands."). Allowing appellate courts to increase sentences even absent any sentencing appeal by the Government by definition denies defendants the notice to which they are entitled.

Second, the possibility that a defendant's sentence may increase if the defendant exercises his right to appeal – even if the Government does not – imposes an unjustifiable burden on that right. This Court has emphasized "the importance of appellate review to a correct adjudication of guilt or innocence." *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion); *see id.* at 19 (those "den[ied] adequate review . . . may lose their life, liberty or property because of unjust convictions which appellate courts would set aside."). Once a defendant is entitled to this right to appeal, he cannot be penalized for exercising it. "A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) (quotation omitted); *see United States v. Medley*, 476 F.3d 835, 841 (10th Cir. 2007) (McConnell, J., concurring) ("Appeals serve an important function, and we should not create disincentives for criminal defendants to appeal when they have meritorious grounds for doing so."). As Judge McConnell has elaborated, a regime that puts a "'tax' on appeals," wherein defendants must subject themselves to a distinct probability of having their sentences enhanced if they exercise their appellate rights, presents "troubling questions of fairness and possibly even of due process." *Medley*, 476 F.3d at 840.

Congress, in fact, recognized precisely this concern in enacting the CCCA, when it *rejected* a proposal to expressly allow appellate courts to increase as well as decrease sentences upon appeal by the defendant alone. Such a rule, the Act's drafters explained, would "place[] an undesirable strain on the defendant's right to seek sentence review." S. Rep. 98-225, at 151 n.370, *reprinted in* 1984 U.S.C.C.A.N. at 3334; *see United States v. Jones*, 460 F.3d 191, 199 (2d Cir. 2006) (Walker, C.J., dissenting) ("Congress sought to protect the complaining party from receiving a more adverse sentence following an appeal. In the absence of this protective scheme, a court of appeals would be able to set aside a sentence as unreasonably low even though it was the defendant, not the government, that chose to pursue an appeal from that sentence.").

Third, increasing a sentence *sua sponte* on appeal compromises the defendant's interest in finality reflected in the Double Jeopardy Clause. *See United States v. DiFrancesco*, 449 U.S. 117, 136 (1980) (defendant may have an expectation of finality implicating the double jeopardy bar when "the time to appeal has expired"); *Williams v. Travis*, 143 F.3d 98, 99 (2d Cir. 1998) (describing the "government's ability to appeal the defendant's sentence" as "an important factor bearing upon a defendant's expectation of finality"). When the government repeatedly and unmistakably indicates its intention not to challenge an aspect of the district court's sentence on appeal, the defendant's expectation of finality with respect to that aspect is particularly well founded. The possibility of *sua sponte* correction of a sentence in such circumstances intolerably compels the defendant "to

live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187-88 (1957). For these reasons, the interests underlying the Double Jeopardy Clause "generally prohibit[] courts from enhancing a defendant's sentence once the defendant has developed a legitimate 'expectation of finality in the original sentence.'" *United States v. Triestman*, 178 F.3d 624, 640 (2d Cir. 1999) (quoting *DiFrancesco*, 449 U.S. at 139).

III. NEITHER SEPARATION OF POWERS PRINCIPLES NOR DUE PROCESS CONCERNS CONSTRAIN THE AUTHORITY OF APPELLATE COURTS TO DECREASE SENTENCES *SUA SPONTE*

The considerations discussed in Parts I & II should preclude appellate courts from increasing a criminal sentence when the Government has elected not to challenge the sentence on appeal. They do not, however, operate the same way in the converse situation, i.e., where the defendant has failed to appeal a sentence that is unlawfully long. This Court has long recognized the general authority of appellate courts to correct errors not challenged on appeal that seriously injure a defendant's rights, including errors that result in unlawfully long sentences. *See Silber v. United States*, 370 U.S. 717, 717-18 (1962) ("in exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings"); *Bartone v. United States*, 375 U.S. 52, 53 (1963) ("This error, in enlarging the sentence in the absence of petitioner,

was so plain . . . that it should have been dealt with by the Court of Appeals, even though it had not been alleged as error."); *accord United States v. Graham*, 275 F.3d 490, 521-22 (6th Cir. 2001). Nothing about the result in this case should cast doubt on that rule.

To start, no separation of powers principles are implicated when a defendant fails to appeal an unlawful sentence. The "government's litigation conduct in a case is apt to differ from that of a private litigant," *Mendoza*, 464 U.S. at 161, not least because, as discussed above, the Government makes appeal decisions in part on the basis of various policy objectives that are of no relevance to a defendant's appeal judgments, *see Avendano-Camacho*, 786 F.2d at 1394 (Government is concerned with consistency and coordination, "considerations that do not weigh as heavily, if at all, in the decision of the defendant"). By contrast, a criminal defendant "generally does not forego an appeal if he believes that he can prevail." *Mendoza*, 464 U.S. at 161. Although criminal defendants generally seek to raise whatever arguments they believe will give them relief on appeal, they are constrained by numerous factors that bear no resemblance to the discretionary judgments that inform Government appeals: word limits and time constraints force defense counsel to make selective judgments about which issues to pursue (and sentencing issues may be secondary when compared with issues that could provide complete relief from judgment); scarce resources may limit the ability to invest in researching and identifying potential errors; and counsel may have less experience than sophisticated Government adversaries in identifying the issues worthy of presentation in a space-limited

appellate brief. For these reasons, a defendant's failure to challenge a sentence ordinarily will be a forfeiture rather than a waiver, and thus should be treated differently from the Government's failure, which is a waiver essentially by definition, as explained above. In short, even when a defendant has not raised a sentencing error on appeal for whatever reason, decreasing an unlawful sentence *sua sponte* will almost certainly be justified to protect the defendant's constitutional liberty interest, and will not contravene any exercise of congressionally-mandated law enforcement discretion.

The Government likewise can assert no due process harms to itself when an appellate court decreases a sentence *sua sponte*. Whatever "rights" the Government generally possesses as a party-litigant, they are not rights of a constitutional dimension comparable to the rights affected by a *sua sponte* sentence increase, i.e., the right to fair notice, to an unencumbered appeal, and to finality. *See supra* Part II. And while the Government has no cognizable due process right in the length of the defendant's sentence, a defendant assuredly does have a due process right – of the most fundamental order – not to be imprisoned for longer than the law allows.

Finally, it bears emphasis that criminal law and procedure generally reflects numerous asymmetries designed to work to the benefit of defendants but not the Government. The Rule of Lenity, for example, requires that ambiguities in criminal laws be construed in favor of criminal defendants, *see, e.g.*, *Hughey v. United States*, 495 U.S. 411, 422 (1990), and applies to "answer questions about the severity of sentencing," *United States v. R.L.C.*, 503 U.S. 291,

305 (1992) (plurality opinion). As described earlier, the right to appeal itself is asymmetrical – all jurisdictions permit criminal defendants to appeal convictions, *see* Joshua Dressler, Understanding Criminal Procedure § 1.03[C][9] (2d ed. 1997), but the Double Jeopardy Clause prohibits Government appeals when a defendant is acquitted, *see Kepner v. United States*, 195 U.S. 100, 133 (1904). The "reasonable doubt" standard of proof influences the "relative frequency" of "two types of erroneous outcomes" – either that guilty persons will be found innocent, or that innocent persons will be convicted – and reflects "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring). The Due Process Clause requires the Government – but not defendants – to disclose all potentially exculpatory evidence material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

As these asymmetries and others demonstrate, there would be nothing unusual about applying different standards to the Government and to defendants in this context. To protect a defendant's fundamental liberty interest, appellate courts generally *must* decrease an illegally long sentence, even when the defendant has, for whatever reason, failed to appeal the sentence. But to protect important separation of powers principles, appellate courts should *never* increase a criminal sentence – no matter how contrary to the statute that sentence may be – when the Government exercises its discretion not to appeal the sentence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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